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No. 84-1113

IN THE

Supreme Court of the United States

October Term, 1984

FORTUNE S. MACRI,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

Petition for a Writ of Certiorari to The Supreme Court, State of New York, Appellate Division, Second Judicial Department

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156 pp

QUESTIONS PRESENTED

Is the institution by a State of an attorney disciplinary proceeding without a meaningful determination of probable cause violative of the requirements of procedural due process and of the 14th and 5th Amendments of the U.S. Constitution?

Is a procedure of the State which allows the prosecuting authority to unilaterally assert additional charges in an attorney disciplinary proceeding without a meaningful determination of probable cause violative of the requirements of procedural due process and of the 14th and 5th Amendments of the U.S. Constitution?

TABLE OF CONTENTS

	Page
Questions Presented	i
Jurisdiction	2
Opinions Below	2
Constitutional and Statutory Provisions	4
Statement of the Case	9
Reasons for Allowance of the Writ	17

APPENDIX

Order of New York Court of Appeals dated September 13, 1984 Denying Motion for Leave to Appeal	1a
Order of Disbarment of Appellate Division dated June 4, 1984*	3a
Decision of Appellate Division dated June 4, 1984	9a
Report of Special Referee, Designated by Appellate Division, dated September 2, 1983	13a

---

*References are to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

Page

Order of Appellate Division dated June 4, 1982 Authorizing Institution of Disciplinary Proceedings 84a

Notice of Petition to Appellate Division dated July 16, 1982 . . . 87a

Petition to Appellate Division dated July 16, 1982 . . . . . 90a

Order of Appellate Division dated October 24, 1982 Referring Issues in Petition to Special Referee . . 106a

Decision of Appellate Division dated October 29, 1982 . . . . . 110a

Notice of Supplemental Petition to Appellate Division dated December 6, 1982 . . . . . 112a

Supplemental Petition to Appellate Division dated December 6, 1982 . . 115a

Order of Appellate Division dated February 10, 1982 Referring Issues in Supplemental Petition to Special Referee 122a

Decision of Appellate Division dated February 10, 1983 . . . . . 126a

Notice of Second Supplemental Petition to Appellate Division dated April 25, 1983 . . . . . 128a

Second Supplemental Petition dated April 25, 1983 . . . . . 131a

Page

Order of Appellate Division dated June 1, 1983 Referring Issues in Second Supplemental Petition to Special Referee 142a

Decision of Appellate Division dated June 2, 1983 . . . . . 146a

TABLE OF AUTHORITIES

Cases	Page
Bates v. St. Bar of Arizona, 433 US 350, 97 S. Ct. 2691, 53 L.Ed.2d 810	20
Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1975)	21
Charlton v. F.T.C., 543 F.2d 903 (D.C. Cir. 1976)	21,22
Committee v. Johnson, 447 F.2d 169 (3rd Cir. 1971)	21
Committee v. Ross, 735 F.2d 1168 (9th Cir. 1984)	21
Cummings v. Missouri, 71 US 277, 18 L.Ed. 356	3
Erdmann v. Stevens, 458 F.2d 1205 (2nd Cir. 1972)	20
Ex Parte Garland, 4 Wall 333	3
Ex Parte Robinson, 86 US (19 Wall) 505, 22 L.Ed. 205	21
Goldfarb v. Virginia, 421 US 773, 95 S. Ct. 2004, 44 L.Ed.2d 572	19
In Re Thies, 662 F.2d 771 (D.C. Cir. 1980)	21
Johnson v. Avery, 393 US 483, 89 S. Ct. 747, 21 L.Ed.2d 718	20

Page

Konigsberg v. California, 353 US 252, 77 S. Ct. 722, 1 L.Ed.2d 810 18

Mattas v. Supreme Court of Pennsylvania, 576 F. Supp. 1178 (1983) 22

Matter of Kelly, 23 NY2d 368 (1968) .. 22

Matter of Ming, 469 F.2d 1352 (7th Cir. 1972) 20

Matter of Ruffalo, 390 US 544, S. Ct. 1222, 20 L.Ed.2d 117 20,21,22,23

Ohralik v. Ohio State Bar Association, 436 US 447, 98 S. Ct. 1912, 56 L.Ed.2d 444 17

Phelps v. Kansas, 662 F.2d 649 (10th Cir. 1981) 21

Randall v. Brigham, 7 Wall 523 20

Schware v. Board of Bar Examiners, 353 US 232, 77 S. Ct. 752, 1 L.Ed.2d 796 19

Selling v. Radford, 243 US 46, 37 S. Ct. 377, 61 L.Ed. 585 18

Spevack v. Klein, 385 U.S. 511, 87 S. Ct. 625, 17 L.Ed.2d 574 ... 18

Staud v. Stewart, 366 F. Supp. 1398 (1973) 22

Page

Theard v. U.S., 354 US 278, 77 S. Ct. 1274, 1 L.Ed.2d 1342 18

Constitutional Provisions

United States Constitution:

5th Amendment 4,19,32

14th Amendment 4,19,32

Statutes

28 USC 1257(3) 17

New York Judiciary Law § 90(2) 5,24

Rules

United States Supreme Court, Rule 17(c) 17

Appellate Division of the Supreme Court of The State of New York, Second Judicial Department, Rule 691.4 (22 NYCRR 691.4) 5,25,26,27,28,29,31

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984
No.

FORTUNE S. MACRI,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT, STATE OF
NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

To the Honorable Chief Justice and
Associate Justices of the Supreme
Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York, Appellate Division, Second Judicial

Department, which disbarred petitioner from the practice of law. The New York Court of Appeals denied leave to appeal.

OPINIONS BELOW

The judgment appealed from is appended hereto at pp. 3a-7a; it is reported at 102 AD2d 53, 476 NYS2d 359 (App Div 2d Dep't, June 4, 1984), lv to appeal den. 63 NY2d 605, ___ NE2d ___ (September 13, 1984).

JURISDICTION

The judgment sought to be reviewed was entered June 4, 1984; leave to appeal to the Court of Appeals of the State of New York was denied by order entered September 13, 1984. There was no order respecting a rehearing or an extension of time in which to petition for certiorari. Jurisdiction to review the judgment by

writ of certiorari is conferred by 28 U.S.C. 1257 (3), and Spevack v. Klein, 385 US 511, 17 L ed 2d 574, 87 S Ct. 625; Cummings v. Missouri, 71 US 277, 18 L ed 356; Matter of Garland, 71 US 333, 19 L ed 366.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitution of the United States

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14

(Adopted July 28, 1868)

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK JUDICIARY LAW § 90(2)

McKinneys Laws, Vol. 29, p. 367

§ 90. Admission to and removal from practice by appellate division; character committees.--

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

RULES OF THE SUPREME COURT
OF THE STATE OF NEW YORK, APPELLATE
DIVISION, SECOND JUDICIAL DEPARTMENT

§ 691.4 (a)(e)(f)(h)

McKinney's 1983 New York Rules
of Court (22 NYCRR § 691.4)

§ 691.4. Appointment of Grievance Committees; Commencement of Investigation of Attorney Misconduct; Complaints; Procedure

(a) This court shall appoint three grievance committees for the Second Judicial Department. One of these grievance committees shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the second and eleventh judicial districts at the time of their admission to practice by the Appellate Division; another shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the ninth judicial district at the time of their admission to practice by the Appellate Division; and the third shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the tenth judicial district at the time of their admission to practice by the Appellate Division. These committees shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom this Part applies pursuant to section 691.1 of this Part.

* * *

(e) Upon receipt or initiation of a specific complaint of professional misconduct, any such committee may, after preliminary investigation and upon a majority vote of the full committee:

(1) dismiss the complaint and so advise the complainant and the attorney;

(2) conclude the matter by issuing a letter of caution to the

attorney and by appropriately advising the complainant of such action;

(3) conclude the matter by privately admonishing the attorney, which admonition shall clearly indicate the improper conduct found and the disciplinary rule, canon or special rule which has been violated, and by appropriately advising the complainant of such action;

(4) serve written charges upon the attorney and hold a hearing on the matter as set forth in subdivision (f) of this section;

(5) forthwith recommend to this court the institution of a disciplinary proceeding where the public interest demands prompt action and where the available facts show probable cause for such action.

(f) Except as otherwise provided for in paragraph (5) of subdivision (e) of this section, if, after preliminary investigation, the committee shall deem a matter of sufficient importance, written charges predicated thereon, plainly stating the matter or matters charged, together with a notice of not less than twenty days, shall be served upon the person concerned, either personally, by certified mail, or in such other manner as the committee may direct. The person so served shall file a written answer at the time and place designated in the notice and the committee or a subcommittee shall proceed to hold a hearing of the case. The person concerned (hereinafter referred to as the respondent) may be represented and assisted by counsel. The committee or subcommittee shall decide all questions of evidence.

Stenographic minutes of the hearing shall be kept.

* * *

(h) If the hearing was held before a subcommittee, it shall make findings of fact and report those findings to the committee. Upon the completion of a hearing, the committee shall promptly meet and either dismiss or sustain the charges and, as to any charges sustained, shall either issue a letter of caution, admonish the respondent, or recommend that probable cause exists for the filing of disciplinary charges against the respondent in this court. A letter of caution may also be issued where the charges have been dismissed. The approval of a recommendation of the filing of disciplinary charges in this court shall be by a majority vote of the full committee.

STATEMENT OF THE CASE

The facts material to the consideration of the questions presented, briefly stated, are as follows:

By letter from the Respondent dated May 8, 1981, Petitioner received notice of a complaint filed by Lydia Naclerio and by letter dated June 8, 1981, Petitioner submitted his answer. Mrs. Naclerio claimed to be entitled to interest on a $30,000 escrow fund, believing the funds to have been deposited by Petitioner in an interest bearing account, which was untrue.* By letter dated

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*The underlying facts of the Naclerio matter are as follows: Petitioner was retained in 1977 by Raymond Naclerio to represent him in a divorce action instituted by his wife, Lydia Naclerio, in the Supreme Court, Bronx County. On or about December 21, 1977, Mr. and Mrs. Naclerio signed a stipulation in settlement of the divorce action which provided, among other things, that Petitioner was to hold $30,000 to be

June 15, 1981 Petitioner was asked to provide additional information, including the identity of the account into which the Naclerio funds had been deposited,

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paid by Mr. Naclerio in escrow pending the entry of a decree of divorce, when the money was to be paid to Mrs. Naclerio in exchange for the conveyance of her interest in the marital residence.

Prior to the delivery of the $30,000 to Petitioner, Mrs. Naclerio had a change of heart, informing her attorney, Fred Yalkowsky, that she no longer wanted to go forward with the divorce action. In early March 1978 Mr. Yalkowky, on Mrs. Naclerio's behalf, moved to discontinue the action and to be relieved as her attorney. Mr. Naclerio, who desired to go forward with the divorce, opposed the motion through his attorney, the Petitioner.

In the interim, Mr. Naclerio turned over $30,000 to Petitioner notwithstanding that his wife had rejected the stipulation and that he, Mr. Naclerio, was under no obligation as to any of its terms. He further informed Petitioner that he, Petitioner, could use the funds for any purpose, with the understanding that if needed in connection with the divorce, they would be made available (T-153). ["T" refers to pages of the transcript at the indicated number; "Rx" refers to Respondent's exhibits and "Px" to Petitioner's exhibits, at the hearings

which information he provided on June 29, 1981 (T-209-11; Px 11-B).

Nine months later, in March 1982, Petitioner received a letter from the

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before the special referee designated by the Appellate Division.]

In November 1980, an understanding was again reached in which Mr. and Mrs. Naclerio agreed to settlement of the divorce proceeding along the lines of the December 1977 stipulation. On November 14, 1980, Mrs. Naclerio and her new attorney, David Ettinger, appeared before Justice Irwin Silbowitz, together with Mr. Naclerio and Petitioner and a stipulation of settlement was placed upon the record, providing, among other things, that Mrs. Naclerio would receive $30,000 upon the entry of a final decree.

Shortly thereafter in December 1980, Mrs. Naclerio again rejected the settlement and her attorney moved on December 19, 1980 for a reinstatement of the action to the contested calendar, a motion which Petitioner opposed. In March 1981, after a conference with Justice Silbowitz, it again appeared that the matter was settled and on or about March 31, 1981 Petitioner gave Mrs. Naclerio's attorney a $30,000 check payable to "Daniel Ettinger, Attorney" which was to be held until the final decree was entered (T-187).

On April 20, 1981, about one week before the divorce decree was signed.

Respondent-Committee, and was served with two subpoenas, in connection with a "sua sponte" complaint alleging that he had converted the Naclerio funds (T-213-14; Rx H). On May 20, 1982, Petitioner appeared at the offices of the Respondent with Counsel and testified under oath. He also produced an affidavit sworn to by Raymond Naclerio, which was accepted as part of the record (Px 12 at p.37), stating that he (Naclerio) authorized Petitioner to use the $30,000 and "gave him full control of the said monies to do

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Mr. Ettinger's secretary gave the $30,000 check to Mrs. Naclerio. Mr. Ettinger, who had already endorsed the check, was in Florida at the time. Mrs. Naclerio was informed by Petitioner's bank that the account balance was insufficient to pay the check. She advised Mr. Ettinger's secretary who informed Petitioner who immediately put a stop payment order on the check (Rx-G).

On April 28, 1981, one day after the degree was signed, Petitioner delivered a $30,000 bank check to Mrs. Naclerio's attorney's office.

whatever he wished with same."

Mr. Naclerio was never interviewed by the Respondent (T 219).

By order dated June 4, 1982, 14 days after Petitioner's "Q&A" session, the Respondent was authorized to institute a disciplinary proceeding against the Petitioner "based upon the acts of professional misconduct set forth in the said Committee's report . . and on any other charges of professional misconduct by the said attorney which may come to the said Committee's attention . . ." (85a). A petition was thereafter served (87a).

Six months later, in December 1982, the Respondent moved in the Appellate Division for leave to serve a supplemental petition adding two additional charges, namely neglect of the Peter Gurenberg matter (Eight) and failure to cooperate regarding the Committee's

investigation of the Gruenberg complaint (Nine).

On December 13, 1982, the first hearing was held before the Special Referee designated by the Appellate Division. On February 10, 1983 the Court granted Respondent leave to file the Supplemental Petition (122a).

On April 25, 1983 the Respondent moved in the Appellate Division 1) for leave to serve a Second Supplemental Petition regarding the Complaint of Lenora Wooster concerning the Estate of Frances Myrick, 2) for Petitioner's immediate suspension from the practice of law and 3) for an order of contempt based upon Petitioner's alleged failure to comply with Committee subpoenas.

By order dated June 2, 1983, the Appellate Division denied the Respondent's motion for an immediate suspension

and for an order of contempt and granted the motion for leave to serve a second supplemental complaint (142a).* That second supplemental Petition dated April 25, 1983, asserted four additional charges regarding the Myrick estate, namely, failure to account for trust funds (Ten), conversions of clients' funds (Eleven), neglect of a legal matter (Twelve) and failure to cooperate with the Committee in the investigation of the Wooster complaint (Thirteen).

Between December 13, 1982 and July 28, 1983, nine hearings were held before the Special Referee, who filed his report on December 7, 1983 (13a).

By order dated June 4, 1984, the Appellate Division confirmed the Referee's

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*At no time was Petitioner afforded a probable cause hearing before the Respondent-Committee on any of the charges.

findings that seven charges were not sustained (conversion--Naclerio - One; issuing a bad check--Naclerio - Two; Neglect--Gruenberg and Myrick estate - Eight and Twelve; failure to honor subpoenas and failure to cooperate--Six, Seven and Thirteen). The Court confirmed that six charges were sustained (misrepresentation, commingling and failure to maintain a "ledger book"--Naclerio - Three, Four, Five; failure to account and conversion--Myrick Estate - Ten, Eleven; failure to cooperate--Gruenberg - Nine). In that same order the Court directed the Petitioner be disbarred "forthwith" (3a). As above noted, leave to appeal was denied by the New York Court of Appeals on September 13, 1984 (1a).

Petitioner has raised the objections that he has been denied procedural due process in that the charges contained

in the disciplinary petitions had received no meaningful prior judicial review and were asserted without a meaningful determination of probable cause, in his motion for leave to appeal to the Court of Appeals (see: Petitioner's, there, "Respondent-Appellant's" Memorandum of Law in support of his motion for leave to appeal, at ps. 10-15).

REASONS FOR ALLOWANCE OF THE WRIT

The writ should be granted, in accordance with 28 USC 1257(3), by virtue of Rule 17(c) of this Court in that a state court has failed to decide a federal question in a way in conformity with applicable decisions of this Court.

This Court will grant certiorari in a case of state disbarment (Ohralik v. Ohio State Bar Association, 436 U.S. 447

98 S. Ct. 1912, 56 L.Ed.2d 444; Spevack v. Klein, 385 US 511, 87 S. Ct. 625, 17 L.Ed.2d 574). A Writ of Certiorari issued by this Court is the only remedy available to review a state disciplinary proceeding, the lower federal courts lacking subject matter jurisdiction to conduct such reviews (Selling v. Radford, 243 U.S. 46, 50, 37 S. Ct. 377, 378, 61 L.Ed. 585; see also: Theard v. United States, 354 US 278, 282, 77 S. Ct. 1274, 1276, 1 L.Ed.2d 1342). Without the availability of certiorari the states could trample upon recognized due process rights of attorneys with impunity.

In Spevack, supra, this Court, following a grant of certiorari, reversed a state disbarment as a violation of due process of law and a violation of federal constitutional rights. Similarly, in Konigsberg v. California, 353 U.S.

252, 77 S. Ct. 722, 1 L.Ed.2d 810 and Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S. Ct. 752, 1 L.Ed.2d 796, this Court granted certiorari to review the constitutionality of state procedures for admission to the bar and in each case reversed the state determination finding due process violations.

The writ should be allowed herein because petitioner's disbarment was in violation of due process under the 14th and 5th Amendments.

This Court has consistently held that although the States have a compelling interest in the regulation of the practice of law (Goldfarb v. Virginia St. Bar, 421 U.S. 773, 792, 95 S. Ct. 2004, 44 L.Ed.2d 572), that power may not be exercised in an arbitrary or discriminatory manner (Konigsberg v. California, supra, nor may it be exercised so as to

abrogate federally protected rights (Bates v. St. Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L.Ed.2d 810; Johnson v. Avery, 393 U.S. 483, 490, 89 S. Ct. 747, 21 L.Ed.2d 718; see also: Erdmann v. Stevens, 458 F.2d 1205, 1210; Matter of Ming, 469 F.2d 1352, 1355).

One of those federally protected rights is an attorney's right to procedural due process in any proceeding seeking the imposition of a disciplinary sanction (Matter of Ruffalo, 390 U.S. 544, 550, 88 S. Ct. 1222, 20 L.Ed.2d 117). In Ruffalo this Court recognized that procedural due process "includes fair notice of the charge . . . 'and opportunity afforded [to] him for explanation and defense" (supra; citing in part Randall v. Brigham, 7 Wall. 523, 540). Specifically, in passing upon the question of "whether in Ohio's procedure there was any lack of due process" this Court held

that:

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. Ex Parte Garland, 4 Wall. 333, 380; Spevack v. Klein, 385 US 511, 515. He is accordingly entitled to procedural due process, which includes fair notice of the charge . . . these are adversary proceedings of a quasi-criminal nature" (supra at 550, 551).*

The Ruffalo ruling has been consistently followed since its pronouncement in 1968 (Committee v. Ross, 735 F.2d 1168, 1170 [9th Cir. 1984]; Phelps v. Kansas, 662 F.2d 649, 651 [10th Cir. 1981]; In Re Thies, 662 F.2d 771 [D.C. Cir. 1980]; Charlton v. F.T.C., 543 F.2d 903 [D.C. Cir. 1976]; Burkett v. Chandler, 505 F.2d 217 [10th Cir. 1975]; Committee

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*The Ruffalo holding was not novel. In 1874 the Supreme Court laid down that "before a judgment disbarring an attorney is rendered, he should have notice of the grounds of complaint against him and ample opportunity of explanation and defense (Ex Parte Robinson, 86 U.S. [19 Wall.] 505, 512-13, 22 L. Ed 205).

v. Johnson, 447 F.2d 169 [3rd Cir. 1971]; see also: Mattas v. Supreme Court of Pennsylvania, 576 F. Supp. 1178 [1983]; Staud v. Stewart, 366 F. Supp. 1398 [1973].

While most of these cases were decided on the issue of notice and opportunity to be heard, the District of Columbia Circuit Court of Appeals in Charlton V. F.T.C., supra, recognized that procedural due process is not limited to notice and opportunity to be heard.* Thus the

*Clearly this Court never intended to limit its holding in Ruffalo to that single consideration. The language "He is accordingly entitled to procedural due process, which includes fair notice of the charge" (supra at 550, emphasis added), infers that due process includes other procedural rights beyond mere notice. Moreover, the 1968 New York Court of Appeals decision in Matter of Kelly (23 NY2d 368), in which the Court limited this Court's holding in Ruffalo, supra, to its facts, i.e. that the "case holds only that . . . due process requires that there be notice of the disciplinary charges before the proceedings are begun" (supra at 384), does not

Court, holding that procedural due process includes the application of an appropriate burden of proof, reversed an order of suspension from practice, finding that the standard of "substantial evidence", that is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . ." (supra at 905), was erroneous:

> in American law a preponderance of the evidence is rock bottom at the factfinding level of civil litigation. Nowhere in our jurisprudence have we discerned acceptance of a standard of proof tolerating "something less than the weight of evidence" (supra at 907).

To the same extent, procedural due process surely includes a meaningful determination of probable cause before the attorney is made the subject of a formal disciplinary proceeding. The question is then, has petitioner been afforded

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comport with this Court's intent in Ruffalo.

a meaningful probable cause determination before disciplinary proceedings were instituted against him by the Appellate Division's order of June 4, 1982 (84a)? The answer is that he was not.

New York Judiciary Law, Section 90 (2) provides that "the supreme court shall have power and control over attorneys and counsellors-at-law . . . and the Appellate Division of the Supreme Court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct . . ." In the exercise of its jurisdiction over attorneys, the Appellate Division, Second Judicial Department has promulgated rules which provide for the appointment of grievance committees which are empowered with the the duty "to investigate and

prosecute matters arising in or concerning attorneys practicing in "their jurisdiction (22 NYCRR 691.4[a]). Such rules further provide that:

> (e) Upon receipt or initiation of a specific complaint of professional misconduct, any such committee may, after preliminary investigation and upon a majority vote of the full committee:
>
> * * *
>
> (4) serve written charges upon the attorney and hold a hearing on the matter as set forth in subdivision (f) of this section;
>
> (5) forthwith recommend to this court the institution of a disciplinary proceeding where the available facts show probable cause for such action.
>
> (f) Except as otherwise provided for in paragraph (5) of subdivision (3) of this section, if, after preliminary investigation, the committee shall deem a matter of sufficient importance, written charges predicated thereon, plainly stating the matter or matters charged, together with a notice of not less than twenty days, shall be served upon the person concerned, either personally, by certified mail, or in such other manner as the committee may direct. The person so served shall file a written

> answer at the time and place designated in the notice and the committee or a subcommittee shall proceed to hold a hearing of the case.
>
> * * *
>
> (h) If the hearing was held before a subcommittee, it shall make findings of fact and report those findings to the committee. Upon the completion of a hearing, the committee shall promptly meet and either dismiss or sustain the charges and, as to any charges sustained, shall either issue a letter of caution, admonish the respondent, or recommend that probable cause exists for the filing of disciplinary charges against the respondent in this court. A letter of caution may also be issued where the charges have been dismissed. The approval of a recommendation of the filing of disciplinary charges in this court shall be by a majority vote of the full committee.

(22 NYCRR 691.4(e)(4)(5)(f)(h), emphasis added).

Thus in recognizing that an attorney has a procedural due process right to a meaningful probable cause determination, Rule 691.4 of the Rules of the Appellate

Division, Second Department requires that written charges be served upon the attorney and that the "Committee or a subcommittee shall proceed to hold a hearing of the case . . ." before the Committee "recommend[s] that probable cause exists for the filing of disciplinary charges against the Petitioner . . ." in the Appellate Division. The only circumstance under which the probable cause Committee hearing may be omitted and the Committee may "forthwith recommend [to the Appellate Division] the institution of a disciplinary proceeding . . . [is] . . . where the public interest demands prompt action and where the available facts show probable cause for such action." (22 NYCRR 691.4(3)(5)).

Petitioner was never afforded his right to a due process hearing before the Committee prior to being made the subject

of a formal proceeding in the Appellate Division. The application of the Appellate Division Rules deprived the Petitioner of procedural due process.

The Appellate Division authorized the institution of this proceeding on June 4, 1982, approximately two weeks after Petitioner appeared and testified before Committee Counsel concerning the "sua sponte" allegation of conversion relating to the Naclerio matter. Petitioner was denied his right to appear before a sub-committee at a probable cause hearing. Had he been afforded his right to the hearing mandated by due process and recognized by Rule 691.4, it is readily apparent that the charges of conversion and issuing a "bad" escrow check relating to Naclerio would never have been brought.

In finding those charges (One and Two) <u>not</u> to have been sustained, the

Referee found and the Appellate Division confirmed that:

> It is quite clear from the evidence that less than one month after the monies were placed in escrow, Mrs. Naclerio abrogated the agreement under which the funds were to be held in escrow . . . I also find that Mr. Naclerio authorized [Petitioner] to use the funds at his discretion until a judgment of divorce was entered.

(61a-62a)

This finding is totally consistent with the testimony given by Petitioner at the May 20, 1982 "Q&A" session and with the statements contained in the affidavit of Petitioner's client, Raymond Naclerio, given to Committee Counsel on May 20, 1982. It is patently obvious that whomever on behalf of the Respondent recommended the filing of these charges, chose to completely ignore the exculpatory evidence provided on Petitioner's behalf, evidence which ultimate led to his exoneration.

In denying Petitioner his right to a probable cause hearing the Respondent apparently claimed that the Naclerio matter required "prompt" action under Rule 691.4(e)(5). This position was clearly erroneous. The underlying complaint filed in June 1981 by Mrs. Naclerio contained no allegation of conversion of funds--she claimed to be entitled to interest on the monies paid to her by Petitioner in April 1981. The Respondent-Committee did not formulate the conversion allegation until nine months after Petitioner filed his answer to the Naclerio complaint. It is further apparent that notwithstanding the exculpatory evidence given to Committee Counsel by Petition on May 20, 1982, it had already been decided that formal charges without hearing would be recommended--a Committee report was filed and an order

to proceed was issued within two weeks.

Moreover, the Respondent failed at any time to interview a material witness, namely, Raymond Naclerio, whose subsequent testimony corroborated Petitioner's innocence of the Naclerio conversion charge. Failing that, they can hardly claim that the "avilable facts show probable cause" for "prompt action" under Rule 691.4.

Petitioner's experience in finding himself the subject of formal charges without a Rule 691.4 hearing is not unusual. It appears that the Respondent-Grievance Committee for the Ninth Judicial District, with the acquiesence of the Appellate Division, consistently denies attorneys their right to a Committee hearing by immediately referring virtually all matters directly to the Court for institution of formal proceedings.

Moreover, the manner in which the Respondent asserted the additional charges against Petitioner in the supplemental and Second Supplemental petitions, namely by unilateral action of the prosecuting authority without meaningful judicial review and without a probable cause determination as to each of those Charges clearly violated Petitioner's constitutional due process rights guaranteed under the 14th and 5th Amendments to the U.S. Constitution.

The Appellate Division's Order of June 4, 1982 provided that formal disciplinary proceedings were to be instituted based upon the "acts of professional misconduct as set forth in the confidential report of the . . . Committee . . . and any other charges of professional misconduct by said attorney which may come to said Committee's attention" (84a).

At that time only the Naclerio matter was under active consideration and presumably it was the only active matter referred to in the Committee's confidential report.* The supplemental petition served in December 1982 relating to Peter Gruenberg, contained two additional charges, namely, neglect and failure to cooperate (Eight and Nine) and the second supplemental petition served in April, 1983, relating to the Frances Myrick estate contained four additional charges, namely, failure to account, conversion, neglect and failure to cooperate (Ten, Eleven, Twelve and Thirteen). The "committee" made no probable cause determination as to any of these charges. The matters which formed the basis of these

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*Petitioner is precluded from examining the "confidental report". It will not be made available to him. The seven charges in the July 16, 1982 petition related only to Naclerio.

charges were included in the petitions prepared by Committee counsel and verified by Committee Chairman, without the knowledge or approval of any other member of the Committee or the Appellate Division. Due process requires at the very least than an authoritative body, i.e., the Grievance Committee, should make a probable cause determination before any charges are asserted against an attorney in a formal proceeding.

The Committee Chairman merely accepted the charges as prepared by Committee Counsel without making any independent determination of probable cause.

Moreover, the Appellate Division orders granting leave to the Respondent to refer supplemental charges were pro forma at best, based solely upon affidavits of Committee counsel, and did

not include an independent probable cause determination of those charges by the Court.* The Respondent-Committee now in its role of Prosecutor, was virtually free to charge Petitioner with anything.

The Referee had every right to assume that the charges contained in the petitions submitted to him had been subjected to some meaningful prior judicial review and that a probable cause determination had been made. In fact this was not the case.

Although the Referee found that Petitioner was not guilty of conversion of funds in the Naclerio charges, it cannot be said that his findings adverse to Petitioner, specifically those relating to

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*As a result of the Respondent's actions in violation of Petitioner's procedural due process rights as above noted, petitions were presented to the referee which were not based upon evidence of probable cause and which were therefore untested and in fact tainted.

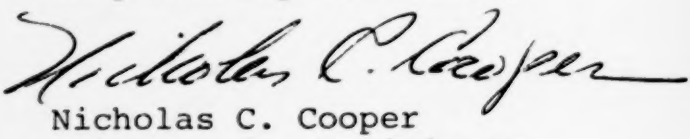
the closely contested issues regarding the Frances Myrick estate, could not have been influenced by the due process violations noted herein. Such influence would have denied Respondent the fair and impartial hearing to which he was entitled.

Conclusion

For the reasons noted herein, a writ of certiorari should issue to review the procedures of disbarment in the Court below.

Dated: Brooklyn, New York
December 7, 1984

Respectfully submitted,



Nicholas C. Cooper
Attorney for Petitioner

APPENDIX

STATE OF NEW YORK
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of September A.D. 1984

PRESENT, HON. LAWRENCE H. COOKE, Chief Judge, presiding.

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2 Mo. No. 776
In the Matter of Fortune S. Macri
(an attorney and counselor at law.)

Grievance Committee for the Ninth Judicial District,

Respondent,

Fortune S. Macri,

Appellant.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for

leave to appeal be and the same hereby is denied, and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

/s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 4, 1984.

HON. MILTON MOLLEN, Presiding Justice,
HON. VITO J. TITONE,
HON. LEON D. LAZER,
HON. GUY J. MANGANO,
HON. DAVID T. GIBBONS.) Associate Justices

In the Matter of Fortune S. Macri, an attorney,

Grievance Committee for the Ninth Judicial District,
Petitioner,

Fortune S. Macri,
Respondent.

Order of Disbarment.

A disciplinary proceeding having been instituted in the court upon the petition of the Grievance Committee for the Ninth Judicial District in respect to Fortune S. Macri, an attorney and counselor at law, who was admitted to practice by the Appellate Division of the Supreme Court, First Judicial Department, on June 18, 1962; the petition praying

that the respondent be disciplined for professional misconduct upon the charges therein set forth; the proceeding having come on before this court by a notice of petition, dated July 16, 1982; and the respondent having filed an answer to the petitioner; and this court, by an order dated October 29, 1982, having referred the issues raised by the petition and the answer to Hon. MORTON B. SILBERMAN (a former Justice of the Supreme Court), as Special Referee, to hear and to report, with his findings upon each of the issues; by further orders of this court, dated February 10, 1983, and June 1, 1983, respectively, the issues raised by a supplemental petition and the answers thereto were also referred to the said Hon. MORTON B. SILBERMAN, as Special Referee, to hear and to report, together with the issues previously referred; and the said referee having held a hearing and having

filed his report with this court on September 7, 1983, together with a transcript of the hearing; and the petitioner and the respondent both having moved separately, by notices of motion, dated September 14, 1983 and October 6, 1983, respectively, to confirm and disaffirm in part the report of the Special Referee;

Now, upon the said petition, verified July 15, 1982; the answer thereto, verified August 18, 1982; the supplemental petition, verified December 6, 1982; the answer thereto, verified December 17, 1982; the second supplemental petition, verified April 25, 1982; the answer thereto, verified July 11, 1983; the report, the transcript; the petitioner's said notice of motion, the affirmation of Gary L. Casella and Petitioner's Proposed Findings and Conclusions in support of petitioner's motion; the respondent's said notice of motion, the affirmation of

Nicholas C. Cooper in support of respondent's motion and respondent's memorandum in support of respondent's motion; and upon all the papers filed herein; and Gary L. Casella, Esq., having appeared of counsel for the petitioner and Nicholas C. Cooper, Esq., having appeared of counsel for the respondent, due deliberation having been had thereon; and upon the OPINION PER CURIAM herein; dated June 4, 1984, wherein the respondent is found guilty of the misconduct outlined therein, heretofore filed and made a part hereof, it is unanimously

ORDERED that the petitioner's motion insofar as it seeks to confirm the special referee's report is hereby granted and is otherwise denied, and it is further

ORDERED that the respondent's motion insofar as it seeks to confirm the special referee's report is granted and is otherwise denied, and it is further

ORDERED that, effective June 4, 1984, the said respondent, Fortune S. Macri, be and he hereby is disbarred from the practice of the law, and the name of Fortune S. Macri is hereby directed to be struck from the Roll of Attorneys and Counselors at Law, and it is further

ORDERED and DIRECTED that the respondent, Fortune S. Macri, shall promptly comply with this court's rules governing the conduct of disbarred, suspended and resigned attorneys - a copy of such rules being annexed hereto and made a part hereof, and it is further

ORDERED that, pursuant to statute (Judiciary Law, § 90), the said Fortune S. Macri be and he hereby is commanded to desist and refrain: (1) from practicing law in any form, either as principal or as agent, clerk or employee of another; (2) from appearing as an attorney or counselor at law before any judge, justice,

board, commission or other public authority; (3) from giving to another an opinion as to the law or its application, or any advice in relation thereto, and (4) from holding himself out in any way as an attorney or counselor at law.

Enter: IRVING N. SELKIN

Clerk of the Appellate Division

SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPT.

I, IRVING N. SELKIN, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy with the original filed in my office on June 4, 1984 and that this copy is a correct transcription of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on June 4, 1984.

/s/ Irving N. Selkin,
Clerk

0025D
Z/ph

June 4, 1984

SUPREME COURT : APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

MOLLEN, P.J., TITONE, LAZER, MANGANO and GIBBONS, JJ.

In the Matter of FORTUNE S. MACRI, an attorney.

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner;

FORTUNE S. MACRI,

Respondent.

Nos. 7952 and 8230

DISCIPLINARY proceeding instituted by the Grievance Committee for the Ninth Judicial District. By orders of this court dated October 29, 1982, February

10, 1983 and June 1, 1983, respectively, the issues were referred to Honorable MORTON B. SILBERMAN, a former Justice of the Supreme Court, as special referee, to hear and report.

Gary L. Casella, White Plains, N.Y., for petitioner.

Nicholas C. Cooper, Brooklyn, N.Y., for respondent.

P E R C U R I A M. The respondent was admitted to practice by the Appellate Division, First Judicial Department, on June 18, 1962. In this proceeding to discipline respondent for professional misconduct, both the petitioner and respondent move to confirm in part and disaffirm in part the report of the special referee.

There were 13 charges of misconduct alleged in the petition. The special referee sustained charges three, four, five, nine, ten and eleven and failed to

sustain charges one, six, seven, eight, twelve and thirteen. Charge two has been withdrawn by the petitioner.

The special referee found respondent guilty of the following allegations of misconduct: misrepresenting facts to a Justice of the Supreme Court and to an adversary attorney; failing to properly maintain an escrow account and commingling clients' funds; failing to maintain a ledger book or similar record of his escrow account in violation of the rules of this court; failing to co-operate with the petitioner in its legitimate investigation of a complaint; failing to fully account for estate funds; and converting to his own use clients' funds in excess of $28,000.

After reviewing all of the evidence, we are in full agreement with the findings contained in the report of the special referee. Respondent is guilty of the

misconduct indicated above. Petitioner's motion insofar as it seeks to confirm the special referee's report is granted and is otherwise denied. Respondent's motion insofar as it seeks to confirm the special referee's report is granted and is otherwise denied.

The respondent is adjudged guilty of serious professional misconduct. Accordingly, the respondent should be, and hereby is, disbarred and his name is ordered stricken from the roll of attorneys and counselors at law, effective forthwith.

MOLLEN, P.J., TITONE, LAZER, MANGANO and GIBBONS, JJ., concur.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

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In the Matter of FORTUNE S. MACRI, an Attorney and Counselor-at-Law:

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner,

-against-

FORTUNE S. MACRI,

Respondent.

REPORT OF SPECIAL REFEREE

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TO THE APPELLATE DIVISION OF THE SUPREME COURT
SECOND JUDICIAL DEPARTMENT

I, MORTON B. SILBERMAN, a former Justice of the Supreme Court of the State of New York, hereby submit my report as Special Referee in this proceeding.

By order of the Appellate Division, Second Judicial Department, dated October

29, 1982, the issues raised by the Petition and the Answer were referred to me, as Special Referee, to hear and to report with my findings on each of the issues. By a further order of this court dated February 10, 1983 the issues raised by a Supplemental Petition and Answer were referred to me to hear and to report with my findings on each of the issues.

Hearings were held on December 13, 1982, March 3, April 26, May 12, June 10, June 21, July 8, July 11, and July 28, 1983.

BACKGROUND STATEMENT AS TO THE CHARGES AGAINST RESPONDENT

Respondent is 52 years old. He was admitted to practice on June 18, 1962. Between 1963 and 1975 Respondent held various governmental positions including Assistant District Attorney, Law Secretary to a Civil Court Judge, Counsel to a State Senator, Rent Commissioner of the City of

New York, and Director of the New York City Firearms Control Board. In September 1975, Respondent entered into a full time practice of law with offices in Westchester County. Respondent continues in a full time practice to the present. (Tr. Pp. 161-166.)

Of the Charges made against Respondent in this proceeding, by far the most serious are contained in the Second Supplemental Petition. Those Charges allege, among other things, that Respondent, as an Attorney for the Executrix of a certain estate, has converted to his own use funds in excess of $28,000 of the said estate.

The Charges in the original Petition herein deal with the alleged failure of Respondent to maintain certain funds in an escrow account. The Charges contained in the Supplemental Petition deal with the alleged neglect of Respondent in handling

a certain legal matter and his failure to communicate with his client.

As stated, the most serious Charges against respondent are those contained in the Second Supplemental Petition regarding the estate matter. Accordingly, this report will deal first with those Charges.

CHARGES TEN THROUGH THIRTEEN

Charges Ten through Thirteen are contained in a second supplemental petition dated April 25, 1983. These Charges relate to the alleged professional misconduct of Respondent as the attorney for one Lenora Wooster as the Exectrix of the Estate of Frances Myrick, deceased. In Charge Ten it is alleged that the gross value of the estate was in excess of $171,000 and that Respondent has failed to fully account for estate funds. In Charge Eleven it is alleged that Respondent has converted to his own use funds in

excess of $28,000 belonging to the estate. In Charge Twelve it is alleged that Respondent has failed to respond to repeated inquiries of his client. In Charge Thirteen it is alleged that Respondent has failed to cooperate with Petitioner with respect to the said matter.

THE EVIDENCE

Lenora Wooster testified that her sister, Frances Myrick, died on November 20, 1977 leaving a will bequeathing eighty percent of her estate to Mrs. Wooster and ten percent each to two other sisters of the decedent. She retained Respondent to represent her in having the will probated and in handling the Estate. Respondent had not previously been Mrs. Wooster's attorney. He had been the attorney for her deceased sister. The will was admitted to probate in the Surrogate's Court of Westchester County on December 27, 1977,

and letters testamentary were issued to Mrs. Wooster as Executrix. An estate checking account was opened by Respondent in Manufacturer's Hanover Trust Company in White Plains, New York. Mrs. Wooster resided in Manhattan. Respondent had his office in White Plains. The checkbook and bank records for the estate were kept in Respondent's office. From time to time Mrs. Wooster would sign checks on the estate account. They would either be mailed to her by Respondent or she would come to Respondent's office to sign checks. (Tr. Pp. 98-102.)

Mrs. Wooster testified that she made an agreement with Respondent that he would receive the sum of five percent of the estate for his fees. She testified that whenever Respondent needed fees he would send her a check for $2500 to be signed by her and that on the face of the check there would be the word "fee". She stated

that she made three such payments totalling $7,500. She also testified that in her sister's estate there were four parcels of real estate, three in New York and one in Connecticut; that Respondent represented the estate on the sale of the three properties in New York for which he was paid fees of $750, $750, and $450, respectively. An attorney in Connecticut was paid a fee of $500 on the sale of the Connecticut property. On July 21, 1981 an order was made by the Surrogate's Court fixing the New York estate tax. (Pet. Ex. 21, Pp. 103-107.) The schedules of the estate tax list attorney's fees in the amount of $8,585 and indicate a gross estate of $171,652, comprised of real property with a value of $124,500, and cash and a mortgate totalling $46,620.

Mrs. Wooster testified that the only knowledge she had of any fees paid to Respondent were the aforementioned. Mrs.

Wooster further testified that she is 65 years of age and that she had been employed by the Department of Labor of the State of New York for some thirty years until her retirement in June, 1980; that a few months before July, 1982 she requested from Respondent the cancelled checks of the estate account; that among the checks she saw one in the amount of $5,000 dated March 21, 1980 payable to Respondent. She testified that that was the first knowledge she had of such a check and that that check bore number 1120. (Pet. Ex. 22, Tr. P. 109.) She testified that she returned to the Respondent the cancelled checks, but had no discussion at that time with Respondent regarding the said $5,000 check. She testified that Respondent also gave her a statement of funds received and distributed by the estate. The statement lists disbursements for the period January

9, 1978 to October 15, 1981 (Pet. Ex. 23). The statement lists receipts for the period December 14, 1977 to November 4, 1981. (Pet. Ex. 24.) The statement of disbursements lists each of the three checks of $2,500 for legal fees and also lists the aforesaid legal fees on the four real estate closings. There is no reference whatever in the statement to the said $5,000 check dated March 21, 1980 payable to Respondent. (Tr. Pp. 108-114.)

Mrs. Wooster also testified that the estate owned a mortgage on a certain house and premises on Coligni Avenue in New Rochelle, New York which premises were owned by a Mr. & Mrs. Warner. The mortgage had a balance of about $40,000. She testified that in 1978 when Mr. & Mrs. Warner were delinquent in the payment of taxes on those premises that the estate issued a check to the Treasurer of the City of New Rochelle in the amount of

$9,279 in payment of the taxes. The statement of disbursements (Pet. Ex. 23) shows a payment by the estate on October 20, 1978 to the Treasurer of the City of New Rochelle for $9,279.72. Mrs. Wooster further testified that when Mr. & Mrs. Warner sold another property that they owned in New Rochele in about January, 1980 that Mr. Warner told her that from the proceeds of that sale he had paid back to the estate the approximately $10,000 that he had been paid by the estate for the unpaid taxes on the Coligni Avenue premises. (Tr. P. 117.) She testified that the statement of receipts by the estate (Pet. Ex. 24) showed no record of the approximately $10,000 allegedly repaid by Mr. Warner to the estate. Mrs. Wooster stated that she questioned Respondent about this but that she could not remember what his answer was. (Tr. Pp. 114-118). She also later testified

that Respondent had told her that the moneys advanced by the estate for payment of taxes on the Warner's property had been repaid. (Tr. P. 393.)

Mr. Sylvester Warner testified that he and his wife owned the premises on Coligni Avenue in New Rochelle on which the estate held a mortgage, and that he and his wife also owned a half interest on other premises in New Rochelle situated on Overlook Circle. The other half interest was owned by his aunt, a Mrs. Zelphia Lane. He testified that in 1978 the estate paid $9,279.72 to the Treasurer of the City of New Rochelle for the unpaid taxes on the Coligni Avenue property; that in December, 1979 he and his wife and his aunt contracted to sell the Overlook Circle property for the sum of $135,000; that the Respondent represented him and his wife, and that Respondent drew the contract and that the contract was signed

in Respondent's office; that his aunt was represented by an attorney, Cora Walker; that on the signing of the contract the purchaser made a ten percent down payment in the amount of $13,500. The contract (Pet. Ex. 38) reflects a down payment of $13,500 to be held in escrow by Respondent as attorney for the sellers. Mr. Warner testified that the closing of title was held on February 1, 1980 at Respondent's office. At the closing, on behalf of the purchaser, a check in the amount of $41,344.84 was issued to Mr. Warner's aunt, Zelphia Lane, and a check of $27,824.84 was issued to Mr. Warner and his wife. (Pet. Exs. 35 and 36.) These sums were the net amounts due Mrs. Lane and Mr. and Mrs. Warner after giving credit to the purchaser for the $13,500 payment made by the purchaser on contract and delivered to Respondent as attorney for Mr. & Mrs. Warner. The difference in the

amounts paid to Mrs. Lane and to Mr. & Mrs. Warner at the closing represented the said $13,500. Mr. Warner testified that he received from Respondent a check for between $2,000 and $3,000 and that at Respondent's request he endorsed another check which Respondent told him was for the repayment to the Myrick estate of the $9,000 plus that had been paid by the estate for unpaid taxes on the Coligni Avenue property. (Tr. Pp. 429-436.)

Closing statements prepared by Cora Walker, attorney for Mrs. Lane and by a Mr. Thomas Quinn, attorney for the purchaser (Pet. Exs. 38 and 39) reflect that Respondent represented Mr. & Mrs. Warner at the closing and also reflect a credit to the purchaser of the $13,500 paid on contract and to be held by the attorney for the sellers.

As previously stated, Petitioner's Exhibit 24 prepared by Respondent listing

all moneys received by the estate between January, 1978 and October 15, 1981 shows no record of any payment to the estate by or on behalf of Mr. & Mrs. Warner in repayment of the moneys advanced by the estate for the unpaid taxes.

Mrs. Wooster testified that in May 1983 counsel for the Grievance Committee showed her photocopies of two checks drawn on the estate account, one in the amount of $25,575 and the other for $5,000., both checks dated March, 1980 and numbered 1118 and 1119. Both checks were made payable to Respondent. She testified that the first time she saw these checks was several days before she testified at this hearing on May 12, 1983. She testified that the signature on the checks appeared to be her signature but that she had no knowledge whatever as to what those checks represented. She testified that she retired from her position at the New York

State Department of Labor in June, 1980. Her office had been in the World Trade Center building in Manhattan. She recalled that several months before June, 1980 Respondent had come to her office and asked her to sign two blank checks. She testified that Respondent told her that he wanted those checks so that if something came up he would have signed checks rather than having to send her checks through the mail and have her send the checks back. She testified that he had never previously signed a blank check but that at that time she remembered signing two blank checks at Respondent's request. (Tr. Pp. 118-123.) Photocopies of these two checks dated March 11, 1980 are part of a group of checks in Petitioners Ex. 19.

In Petitioner's Ex. 23, the statement of disbursements of the estate prepared by Respondent, there is no record of either of said checks. In the checkbook

stubs of the estate account (Pet. Ex. 34A, 34B, 34C) the check numbers run consecutively from number 1001 to number 1072. The aforesaid two checks dated March 11, 1980 in the respective amounts of $25,575. and $5,000 are numbered 1118 and 1119. The check of $5,000 previously referred to bearing the notation "fee" is check number 1120 and is dated March 21, 1980. (Pet. Ex. 22.)

Mrs. Wooster testified that in July, 1982 at Respondent's office Respondent gave to her seven checks. Six of the checks totalled $51,633.72 purportedly representing her distributive share of the estate. Another check in the amount of $2,216.08 purportedly represented her executrix commissions. Together with these checks Respondent gave her a letter dated July 6, 1982 (Tr. P. 123; Pet. Ex. 25.) The letter recites that the said checks are her distributive share and her executrix com-

missions. Respondent also gave to her a check for each of her sisters representing their purported distributive share of the estate. Mrs. Wooster testified that she deposited the $2,216.08 check for her commissions and that the check was returned to her for uncollected funds. She testified that she did not attempt to deposit the other checks totalling $51,633.72 because she had called the bank to inquire whether she could cash the checks and she had been told that there were insufficient funds to pay those checks. She testified that she had called Respondent to question him and that she was given an appointment and she eventually saw Respondent at his office on October 14, 1982. She testified that in the interim she had been told by one of her sisters that the check which she had deposited had also been returned.

She also testified that on September 17, 1982 Respondent deposited in the estate

checking account approximately $17,000 which was a return of escrow monies that had been desposited with title insurance companies on the several real estate transactions. She testified that after the deposit of that $17,000 that the checks given to each of her sisters of approximately $8,000 each were then paid from the estate account. (Tr. Pp. 123-127.) She testified that when she had questioned Respondent as to why there wasn't sufficient funds for her checks to clear that he told her that it was because the monies were in certificates of deposit in a New Jersey bank. (Tr. Pp. 128-129.)

Mrs. Wooster testified that prior to her appointment with Respondent on October 14, 1982 that he had told her that she would receive her money on that day. She testified that when he did not have the money for her on October 14th, she told him that she was going to the Bar Associa-

tion. She testified that he then told her that the estate would be settled on October 22nd and that she requested that he put it in writing and that he gave her a letter dated October 14, 1982. (Pet. Ex. 26.) That letter states "The Estate of Frances Myrick will be settled on October 22, 1982 pursuant to the discussion had this date in my office."

She further testified that on the morning of October 22nd she received a telephone call from Respondent telling her that something had come up and that she should not come to his office. She testified that she thereafter made several telephone calls to him which were unanswered and that she then made her complaint to the Bar Association. (Tr. Pp. 135-36.)

She testified that up to the time of this hearing she has still not received any payment of the $51,633.72 purportedly

her distributive share of the estate, or the $2,216.08 purportedly her commissions as executrix.

Respondent testified on each of the above transactions.

With respect to the $9,279 advanced by the estate for payment of taxes on the Warner property, he stated that he had no recollection of that sum being repaid by the Warners to the estate. He gave no explanation as to what happened to the $12,500 that had been paid to him to be held by him in escrow as the attorney for the Warners at the time they contracted to sell other property owned by them. In the face of the testimony of Mr. Warner that following the closing of title that Respondent had given him a check for $2,000 to $3,000 and had requested Mr. Warner to endorse another check for the purpose of repaying to the Myrick estate the monies advanced for taxes, Respondent produced no

closing statement of the title closing nor any other records relating to the $13,500 that had been deposited with him in escrow on that title closing. At the hearing herein on July 11, 1983 Respondent testified that the file on this title closing was in storage and that he would make every effort to obtain that file and to produce the closing statement of that title closing. (Tr. Pp. 417-421.) At the following hearing on July 28, 1983, which was the last hearing date, Respondent did not produce the closing statement nor did he give any explanation regarding his failure to produce such closing statement.

With respect to checks number 1118, 1119 and 1120 of the estate account each made payable to Respondent in the respective amounts of $25,575., $5,000., and, $5,000., dated respectively March 11, 1980, March 11, 1980 and March 21, 1980, Respondent's explanation for those checks

was that they were a loan given to him by Mrs. Wooster. (Tr. Pp. 301-304.) Mrs. Wooster denied that there was ever a loan given by her to Respondent and denied that there was even any discussion concerning a loan. (Tr. Pp. 351-352.) Respondent testified that his former secretary, a Mrs. Eisen, prepared a promissory note for the total of those three checks for $38,575.[1] He testified that he believed that there was a copy of such note but that he could not locate it. He testified that he did not know if a letter was sent to Mrs. Wooster when the checks were allegedly sent to her to be signed by her. Respondent stated that Mrs. Eisen had handled the entire transaction with Mrs. Wooster and that it was she who had prepared the checks for Mrs. Wooster to sign

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1. Respondent mistakenly believed that three checks totalled $38,575. In fact, they totalled $35,575.

and that it was she who had prepared the promissory note for him to sign. (Tr. Pp. 316-317.) On rebuttal, Mrs. Wooster testified that she never had any dealings with Mrs. Eisen regarding the Estate. (Tr. Pp. 360-365.) The Respondent testified that Mrs. Eisen had left his employ in mid-1981 and was now living in Florida. At the hearing on June 21, 1983 counsel for respondent indicated that they were attempting to locate Mrs. Eisen in Florida and that at the conclusion of that day's hearing an adjournment was going to be requested for the purpose of locating her and having her testify. (Tr. Pp. 194-195.) The next scheduled hearing was July 8, 1983. At that time counsel for Respondent stated that Mrs. Eisen had been located and would be available to testify on July 28th or July 29th. The matter was adjourned until July 28th "for the purpose of giving the Respondent an oppor-

tunity to produce Mrs. Eisen". (Tr. Pp. 420-421.) At the final hearing on July 28, 1983, Respondent's counsel stated that Mrs. Eisen would not be able to appear to testify because of illness, and that Respondent would complete the hearing without her testimony. (Tr. P. 424.)

Respondent had no explanation as to why two of the estate checks were dated March 11, 1980 and the third one was dated March 21, 1980. He had no explanation as to why on the face of the check for $5,000 dated March 21, 1980 the word "fee" appeared thereon. Respondent also had no explanation as to why in Petitioner's Ex. 23, the statement of disbursements of the estate prepared by him, there was no reference to any of those three checks. Respondent also had no explanation as to why these checks dated in March, 1980 bore numbers 1118, 1119, and 1120 whereas the last numbered check in the checkbook stubs

was numbered 1072, and was dated March 31, 1980. (Tr. Pp. 331-334.)

When questioned about when the alleged loan was to be repaid Respondent was indefinite. (Tr. P. 303.) When questioned as to why in July, 1982 he had issued to Mrs. Wooster estate checks totaling $53,849.80 when he knew that there were insufficient funds in the estate account for payment of same, his explanation was that she knew that the money was not there and that he told her that he would need until July of 1983 for repayment of her money. He testified that even though she knew there were no moneys there that she insisted on having the checks. (Tr. Pp. 306; 319.)

When questioned as to what he meant in his letter of October 14, 1982 when he stated that the estate would be settled on October 22, 1982 his explanation was that although Mrs. Wooster had agreed that he

could have until July 1983 to pay her, that she suddenly started pressing him and that even when he wrote that letter he meant that the estate would be settled but the payment of the loan would not be until July, 1983. (Tr. Pp. 307-308.)

During the cross examination of Respondent he testified that no formal accounting had ever been prepared for the estate but that there had been an informal accounting. Respondent produced from his file a document dated February 13, 1983 (Resp. Ex. O) entitled "Release and Discharge". It is signed by the three legatees including Mrs. Wooster. It lists amounts of receipts and amounts of disbursements and shows a balance on hand of $88,258.24. When questioned as to what had happened to that balance, Respondent had no explanation. (Tr. Pp. 340-346.) He also testified that he did not know what amount was due Mrs. Wooster for her

distributive share of the estate. (Tr. Pp. 345-346.)

Respondent testified at the hearing on July 11, 1983 that the moneys due Mrs. Wooster would be paid, "probably in two weeks". (Tr. P. 308.) At the hearing of July 28, 1983, the final hearing, Respondent testified that he was going to pay Mrs. Wooster the total of the checks which she is holding ($53,849.80) "probably in the next twenty-four hours". (Tr. P. 451.) As of the date of this report I have received no information that any of said moneys have been paid by Respondent to Mrs. Wooster.

CHARGE TEN

In this Charge it is alleged that in 1978 Respondent was retained to settle the estate of Francis Myrick; that the value of the gross estate was in excess of $170,000; and that Respondent has failed

to fully account for estate funds.

FINDINGS AS TO CHARGE TEN

1. In or about November, 1977 Respondent was retained by Lenora Wooster, the named Executrix in the will of her deceased sister, Frances Myrick, to represent her in probating the will and the administration of the estate.

2. On July 21, 1981 an order was made by the Surrogate's Court of Westchester County fixing the New York State tax wherein the gross value of the estate was determined to be $171,652.

3. Respondent, as attorney for the executrix, has never prepared or filed a final accounting of the estate. In February, 1982 Respondent prepared an "Executor's Release and Discharge" (Resp. Ex. O) wherein he showed a balance in the estate of $88,258.24. Respondent has never submitted any accounting, formal or

informal, with respect to said balance.

CONCLUSIONS AS TO CHARGE TEN

I find this Charge to have been fully sustained. Respondent has never made any accounting of the estate. In his testimony Respondent admitted that he does not know what amounts are still due the principal legatee, his client Mrs. Lenora Wooster.

CHARGE ELEVEN

In this Charge it is alleged that Respondent has converted to his own use and for his own purpose funds in excess of $28,000 belonging to the estate of Frances Myrick.

FINDINGS AS TO CHARGE ELEVEN

1. In July, 1982 Respondent caused to be issued six checks drawn on the account of the Estate of Frances Myrick, deceased, totalling $51,633.72 payable to

Lenora Wooster and represented said checks to be the remaining portion of her distributive share of the estate of Frances Myrick. Simultaneously, Respondent caused to be issued an Estate check in the amount of $2,216.08 representing same to be the amount of commissions due Mrs. Wooster as executrix of the estate.

2. At the time said checks were issued and up to the conclusion of the hearings held on this Charge there were insufficient funds in the estate account for payment of said checks.

3. In about March, 1980 Respondent requested his client, Lenora Wooster, to sign two estate checks in blank. She did sign two checks in blank and delivered them to Respondent. In May, 1983 she learned that those two checks were negotiated by Respondent as the payee in the respective amounts of $25,575, and $5,000.

4. These two checks were not a loan to Respondent. These two checks were made payable to Respondent and negotiated by Respondent in March, 1980 without the knowledge or authorization of the Executrix of the Estate.

5. A check dated March 21, 1980 in the amount of $5,000 bearing number 1120 with the word "fee" on the face thereof, payable to Respondent was negotiated by Respondent without the knowledge or authorization of the Executrix of the Estate.

6. The sum of $9,279 advanced by the estate of Frances Myrick for payment of real estate taxes on property owned by a Mr. & Mrs. Warner in New Rochelle, New York was paid to Respondent by Mr. & Mrs. Warner in February 1980, for repayment to the estate. Respondent did not turn over the said moneys to the estate.

CONCLUSIONS AS TO CHARGE ELEVEN

I find the Charges herein to have been sustained. The evidence strongly indicates that Respondent has converted to his own use funds of the estate in excess of $28,000 as charged. In the absence of a formal accounting or an audit, the actual amount is unknown. The amount would appear to be at least the total of the checks issued to Mrs. Lenora Wooster in July 1982 amounting to $53,849.80.

CHARGE TWELVE

In Charge Twelve the allegations in the previous Charges are realleged and it is further alleged that the Respondent has failed to respond to repeated inquiries of his client Lenora Wooster, the Executrix of the Estate of Frances Myrick, with respect to settlement of the estate.

FINDINGS AND CONCLUSIONS AS TO CHARGE TWELVE

From the evidence it would appear that until October 22, 1982 Respondent did remain in communication with his client, Mrs. Lenora Wooster. Following his failure to settle the estate as promised on October 22, 1982, Mrs. Wooster filed a formal complaint with the Grievance Committee of the Ninth Judicial District. The evidence does not sustain the Charges herein of a failure to respond to inquiries of his client up to the time of the filing of a complaint against the Respondent. I find the Charges in Charge Twelve not to have been sustained.

CHARGE THIRTEEN

In Charge Thirteen, it is alleged that the Grievance Committee of the Ninth Judicial District by letter dated February 18, 1983 requested Respondent to

submit an answer to the complaint of Lenora Wooster and that an answer was not timely received; that on March 3, 1983 Respondent was served with a subpoena returnable March 14, 1983; that by letter dated March 4, 1983 that Respondent submitted "a brief and incomplete response to the complaint of Lenora Wooster"; that by letter dated March 14, 1983 Petitioner confirmed to Respondent an adjournment of the return date of the subpoena to April 4, 1983 so that Respondent could retain counsel; that a further adjournment was requested and granted to April 21, 1983; that on April 21, 1983 an attorney who appeared on behalf of the Respondent advised of Respondent's inability to be present; and it is further alleged that Respondent has flaunted the said subpoena.

FINDINGS AND CONCLUSIONS AS TO CHARGE THIRTEEN

The evidence indicates that from the time Respondent received from the Petitioner notice of the complaint herein he communicated with and responded to Petitioner's requests. The evidence indicates that there were a series of adjournments consented to by the Petitioner. (Tr. Pp. 223-229.) The evidence does not support the Charge of Respondent having failed to cooperate with the Petitioner on this complaint. I find said Charge not to have been sustained.

CHARGES ONE THROUGH SEVEN

Charges One through Seven, contained in the original Petition, evolve about a sum of $30,000 to be held in escrow by the Respondent. These funds were deposited in escrow with Respondent pursuant to a stipulation in a matrimonial action in

which Respondent represented a Mr. Raymond Naclerio in a divorce action brought by one Lydia Naclerio.

THE EVIDENCE

On December 21, 1977 a stipulation was entered into between Mr. & Mrs. Naclerio in a divorce action pending in the Supreme Court of the State of New York, County of Bronx. The stipulation (Pet. Ex. 1) set forth a settlement of the property rights between the parties. Among its provisions, paragraph 5 provided that the husband pay to the wife the sum of $35,000 for her interest in the marital residence owned by the parties jointly. Paragraph 7 of the agreement provided that the said sum was to be paid by a payment of $5,000 upon execution of the stipulation and a deed, and $30,000 to be held in escrow by Mr. Naclerio's attorney, the Respondent

herein, until he was furnished with a certified copy of a divorce judgment at which time the said $30,000 was to be turned over to Mrs. Naclerio.

A payment of $5,000 was made to Mrs. Naclerio when she executed the agreement on December 21, 1977. Almost immediately thereafter she indicated an intention to renounce the agreement. At the time she executed the agreement she was represented by an attorney, Fred Yalkowsky, Esq. Respondent testified that very shortly after the agreement was executed, Mr. Yalkowsky informed him that he was having considerable difficulty with his client in that she apparently had had a change of mind regarding a settlement of the action. (Tr. Pp. 173; 244-245.) Respondent also testified that on February 21, 1978 his client, Mr. Naclerio, delivered to him a check in the amount of $30,000 which check was

deposited by Respondent in his escrow account. (Tr. P. 172; Resp. Ex. C.) Respondent testified that when the check was delivered to him by his client, he informed Mr. Naclerio of the information given to him by Mrs. Naclerio's attorney to the effect that she was not going to abide by the stipulation agreement and that therefore there would be no need to place the money in escrow. Respondent testified that Mr. Naclerio insisted that Respondent take the money and that Mr. Naclerio authorized him to use the funds at his discretion until the case was finalized and then to turn the money over to his wife. (Tr. Pp. 174-175.) Mr. Naclerio also testified to the same effect. Mr. Naclerio testified that he had known Respondent for many years and had complete trust and confidence in him, and that he authorized Respondent to use the $30,000 funds at his discretion.

(Tr. Pp. 152-53.)

Shortly thereafter by Notice of Motion dated March 2, 1978, Mr. Yalkowsky, Mrs. Naclerio's attorney, sought an order discontinuing the pending divorce action without prejudice and to be relieved as attorney for the plaintiff. (Resp. Ex. B.) In the motion papers Mr. Yalkowsky recites that on December 22, 1978 (sic), the day after the stipulation agreement between the parties that he prepared papers required for submission on an uncontested matrimonial. His affidavit then recites his difficulty in contacting his client until mid-February 1978 when "she told him that he was to stop all proceedings immediately, that she could not live with the agreement that had been made and that new problems had developed between the parties". He also recites in his affidavit that she requested that the action be removed from

the calendar, and that it be discontinued and that it was her intention to obtain a new attorney at some later time to handle her matrimonial difficulties. That portion of the motion which sought to discontinue the action was opposed by Respondent on behalf of Mr. Naclerio. An order was thereafter made on June 15, 1978 by Hon. Joseph DeFede. (Pet. Ex. 2.) That order directed Mrs. Naclerio to return to the Respondent, as attorney for the defendant, the sum of $5,000 and further ordered that upon proof of such payment and the filing of an Answer by the defendant, that the action be transferred to the Contested Matrimonial Calendar for trial. The order also granted Mr. Yalkowsky's application to be relieved as Mrs. Naclerio's attorney. The $5,000 was never returned by Mrs. Naclerio. (Tr. P. 178.)

More than two years then elapsed until Mrs. Naclerio retained another attorney, a Daniel K. Ettinger. Mr. Ettinger and Respondent entered into negotiations on behalf of their clients resulting in a stipulation of settlement which was entered into before Hon. Irwin M. Silbowitz, a Justice of the Supreme Court in Bronx County, on November 14, 1980. This stipulation (Pet. Ex. 3) contains a recital by the Respondent: "It is hereby stipulated and agreed by and between the parties that upon payment of the agreed thirty five thousand ($35,000) dollars being held in escrow to the plaintiff, Lydia Naclerio, by the defendant, Raymond Naclerio, the plaintiff will withdraw any and all allegations to the contested matrimonial and proceed with the abandonment allegations of the said complaint. Plaintiff acknowledges receipt of the five thousand ($5,000) dollars".

The said stipulation then goes on to recite the remaining terms of the settlement.

Within one month after the aforesaid stipulation was entered into before Mr. Justice Silbowitz, Mrs. Naclerio again changed her mind. By Notice of Motion dated December 8, 1930 (Respon. Ex. F) her new attorney, Mr. Ettinger, sought an order reinstating the divorce action to the trial calendar and vacating the stipulation and seeking other relief including a direction "that the $30,000 of plaintiff's money currently being held in escrow by defendant's attorney be immediately turned over to plaintiff's attorney". The motion was opposed by Respondent on behalf of Mr. Naclerio. Conferences were had between the attorneys and Judge Silbowitz. The motion was ultimately withdrawn. (Tr. P.

186.) A judgment of divorce was entered on April 27, 1981.

Between the time of the final settlement and the entry of judgment, Respondent had delivered to Mr. Ettinger a check from his escrow account in the amount of $30,000 payable to Mr. Ettinger, as attorney for Mrs. Naclerio. (Pet. Ex. 4.) Respondent and Mr. Ettinger both testified that that check was to be held by Mr. Ettinger until entry of the judgment. Mr. Ettinger testified that while he was on vacation his secretary mistakenly delivered the check to Mrs. Naclerio. (Tr. P. 40-41; 50.) Respondent testified that when he learned of this he issued a stop payment order on the said check. Respondent also testified that the day after the signing of the divorce judgment he delivered to Mr. Ettinger a bank teller's check in the

said amount of $30,000. (Tr. Pp. 187-190.)

As stated, the $30,000 was originally given by Mr. Naclerio to Respondent on February 21, 1978. Bank statements of the said escrow account (Pet. Ex. 15) indicate that by April, 1978 there was a balance of some $24,000 in the said escrow account and thereafter there was almost consistently balances in the escrow account of less than $30,000. Respondent's explanation for the $30,000 not being retained in his escrow account, at least from April, 1978 to November, 1980, was that the stipulation had been abrogated by Mrs. Naclerio, her divorce action had been discontinued, and he had been authorized by Mr. Naclerio to use the funds at his discretion. As stated, Mr. Naclerio had similarly testified.

With respect to the stipulation of settlement entered into before Mr. Justice

Silbowitz on November 14, 1980, wherein Respondent stated on the record that the said monies were being held in escrow, his explanation was that while he was dictating essentially the same terms as were contained in the original stipulation of December 21, 1977, that the court reporter interrupted him and suggested that he give to the court reporter the remaining pages of the original stipulation which he would then copy for the new stipulation. (Tr. Pp. 180-183.)

CHARGE ONE

Charge One alleges that pursuant to the stipulation between Mr. & Mrs. Naclerio of December 21, 1977 the sum of $30,000 was to be held in escrow by the Respondent until he was furnished with a certified copy of a judgment of divorce between the parties. It is also alleged that "although he was without authority

to withdraw the aforesaid funds from escrow, as early as April, 1978, Respondent's account dropped below the $30,000 he was required to be holding as a result of his conversion of the escrow funds entrusted to him", and that thereafter until in, or about April, 1981 Respondent's escrow account repeatedly reflected overdrafts "as a result of his having converted funds which were entrusted to him to be held in escrow".

FINDINGS AS TO CHARGE ONE

1. On December 21, 1977 a stipulation was entered into between Lydia Naclerio and Raymond Naclerio in a pending divorce action wherein, among other things, Mr. Naclerio was to pay $35,000 to Mrs. Naclerio for her interest in the marital residence. The said amount was to be paid by an immediate payment of $5,000 and the balance of $30,000 to be

paid to Mr. Naclerio's attorney, the Respondent, to be held by him in escrow pending the entry of a judgment of divorce between the parties. Respondent made a $5,000 payment to Mrs. Naclerio on December 21, 1977.

2. On February 21, 1978 Respondent deposited in his escrow account the sum of $30,000 received from Mr. Naclerio in accordance with the stipulation.

3. In March, 1978 Mrs. Naclerio instructed her attorney to dissolve the said agreement, to discontinue the pending divorce action and no longer to represent her. Accordingly, her attorney served upon Respondent motion papers seeking such relief which resulted in an order dated June 15, 1978 directing Mrs. Naclerio to return the $5,000 previously received by her from Respondent, and transferring the pending action to the Contested Matrimonial Calendar.

4. At or about the time the said motion was made by Mrs. Naclerio, Respondent was authorized by his client, Mr. Naclerio, to use at his discretion the $30,000 which had been placed in escrow pursuant to the stipulation which had been abrogated by Mrs. Naclerio.

5. Thereafter, for more than two years nothing occurred in the matrimonial action. During that period Respondent did use for his own purposes all or part of the said $30,000.

6. On November 14, 1980 a new agreement was entered into between the parties before Mr. Justice Silbowitz in Supreme Court, Bronx County. A stipulation of settlement was entered into on the record which reflects it having been dictated by Respondent. On the first page of that stipulation, Respondent recited that the said $35,000 was being held in escrow and that plaintiff

acknowledged receipt of $5,000.

7. On April 27, 1981 a judgment of divorce between the parties was signed. On April 28, 1981 Respondent delivered to Mrs. Naclerio's attorney a bank teller's check in the amount of $30,000.

CONCLUSIONS AS TO CHARGE ONE

I find that that portion of Charge One which alleges a conversion by Respondent of funds from the $30,000 escrow not to have been sustained. It is quite clear from the evidence that less than one month after the monies were placed in escrow, Mrs. Naclerio abrogated the agreement under which the funds were to be held in escrow. This is clearly reflected by the motion brought by her then attorney to discontinue the action. I also find that Mr. Naclerio authorized Respondent to use the funds at his discretion until a judgment of divorce was

entered. I also conclude, however, that from November 14, 1980 when a new stipulation of settlement was arrived at between the parites before Mr. Justice Silbowitz wherein Respondent stated on the record that the said $30,000 was being held in escrow, that such constituted professional misconduct as alleged in Charge Three herein which will be discussed under that heading.

CHARGE TWO

Under this Charge it is alleged that by check dated March 31, 1981 in the amount of $30,000 drawn on Respondent's escrow account and delivered to Mrs. Naclerio's attorney, that Respondent purported to make payment of the $30,000 which he was to have been holding in escrow. It is further alleged that at that time and until approximately April 28, 1981 there was less than $1,000 on

deposit in said account. It is further alleged that by teller's check dated April 28, 1981 in the amount of $30,000 Respondent caused payment to be made to Mrs. Naclerio.

FINDINGS AS TO CHARGE TWO

1. The issuance by Respondent of the check for $30,000 dated March 41, 1981 payable to Daniel Ettinger as attorney for Lydia Naclerio, was delivered to Mr. Ettinger with the understanding that it would be held by him until entry of the judgment of divorce.

2. Prior to the entry of the judgment of divorce, Mr. Ettinger's secretary mistakenly delivered the check to Mrs. Naclerio.

3. Upon learning of this, Respondent issued a stop payment order against the said check.

4. On April 28, 1981, the day after

the judgement of divorce, Respondent delivered to Mrs. Naclerio's attorney a bank teller's check in the amount of $30,000.

CONCLUSIONS AS TO CHARGE TWO

Respondent is guilty of no professional misconduct as alleged in this Charge. Both Respondent and Mrs. Naclerio's attorney, Daniel Ettinger, testified that it was the intent of both that the check dated March 31, 1981 given by Respondent to Mr. Ettinger was to be held until the entry of a judgment of divorce. Mr. Ettinger acknowledged that while he was on vacation the check was mistakenly delivered by his secretary to Mrs. Naclerio resulting in a stop payment order by Respondent. Upon entry of the divorce judgment, Respondent, on April 28, 1981, delivered to Mr. Ettinger a bank teller's check in the sum of $30,000.

CHARGE THREE

In this Charge it is alleged that on November 14, 1980 Respondent appeared in Supreme Court, Bronx County, before Hon. Irwin M. Silbowitz in the Naclerio action and that at that time Respondent read a stipulation into the record "in which he falsely represented that the $30,000 was being held in escrow by him when, in reality, the balance in his escrow account at the time was only $37.75".

FINDINGS AS TO CHARGE THREE

1. On November 14, 1980 Respondent appeared before Mr. Justice Silbowitz representing Mr. Naclerio in the Naclerio divorce action. After the terms of a settlement had been agreed upon the transcript of the record before the court indicates that the Respondent dictated a stipulation of settlement. On the first

page of the transcript Respondent is quoted as stating: "It is hereby stipulated and agreed by and between the parties that upon payment of the agreed $35,000 being held in escrow to the plaintiff, ***(of which) plaintiff acknowledges receipt of $5,000".

2. The remainder of the stipulation consisting of seven pages deal with various other property matters.

3. At the time such statement was made by Respondent he did not have in his escrow account the said $30,000.

CONCLUSIONS AS TO CHARGE THREE

I find this Charge to have been sustained. Respondent did represent to the court and to Mrs. Naclerio and her attorney that the said sum of $30,000 was then being held in escrow. At the time he made such statement he knew that the said sum was not in his escrow account.

Respondent's explanation to the effect that the court reporter requested the original stipulation of December 21, 1977 from which Respondent was dictating to avoid the necessity of Respondent having to continue to dictate from same, I find to be unconvincing. Respondent testified that after court appearance he received from the court reporter an envelope containing three pages of the stipulation of December 21, 1977 which he had left with the court reporter. The envelope containing those three pages and the three pages are marked as Respondent Ex. E. Those three pages, however, do not contain that portion of the stipulation pertaining to the $35,000 to be held in escrow as appears in the stipulation entered into before Judge Silbowitz. Those pages deal essentially with "boiler plate" recitations as are commonly found in such stipulations.

CHARGE FOUR

Under this Charge it is alleged that between 1976 to date Respondent maintained a certain escrow account in "which account Respondent comingled (sic) clients' and personal funds and caused checks to be issued for both escrow and personal obligations".

FINDINGS AND CONCLUSIONS AS TO CHARGE FOUR

1. Respondent admitted that he did comingle personal funds with escrow funds in his escrow account. He so testified (Tr. Pp. 197-198; 265-66.) Accordingly, I find this Charge to have been sustained.

CHARGE FIVE

Under this Charge it is alleged that Respondent from 1977 to date failed to maintain "a ledger book or similar record for his attorney's escrow account in violation of Section 691.12(b) of the

Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department".

FINDINGS AND CONCLUSIONS AS TO CHARGE FIVE

1. In his Answer to the Petition herein, Respondent admitted the allegations in this Charge.

2. At the hearing Respondent stated that he was mistaken in admitting said Charge in his Answer, and stated that although he did not maintain a ledger book for his escrow account that he did maintain "a similar record" for his escrow accounts. He testified that he kept a record of his escrow funds in the check stubs of his escrow account checkbook. (Tr. Pp. 198-201; 267-269). He further testified that he no longer had the checkbook stubs of that account because same was lost or stolen in the course of moving his law offices from one location to

another. He also testified that at the present time he does not maintain a separate ledger book but keeps "a similar record" in his checkbook stubs.

3. I conclude that the Charges herein have been sustained. The alleged entries in the unproduced checkbook stubs of Respondent's escrow checking account would not constitute "a ledger book or similar record" for his attorney's escrow account as required by the Rules of the Appellate Division, Second Department.

CHARGE SIX

Under this Charge it is alleged that Respondent "has been guilty of conduct which is prejudicial to the administration of justice***by substantially failing to honor a subpoena duces tecum, so ordered by the Appellate Division".

FINDINGS AND CONCLUSIONS AS TO CHARGE SIX

1. Respondent did not produce certain checks, check stub books, deposit slips and bank statements for his escrow account which had been subpoenaed. His explanation was that these records were lost or stolen in the process of moving his office location. (Tr. Pp. 217-219.) There is nothing in this record to indicate any other reasons for Respondent's failure to produce such records. I find the Charges herein not to have been sustained.

CHARGE SEVEN

Under this Charge it is alleged that Respondent has been guilty of conduct prejudicial to the administration of justice by failing to cooperate with Petitioner in that on May 20, 1982 when Respondent gave testimony under oath at

the offices of Petitioner, pursuant to a judicial subpoena that "in a clear effort to impede the investigation of Petitioner, Respondent repeatedly testified that he could not recollect, inter alia, why certainly large withdrawals were made from his attorney escrow account or why continuous overdrafts in that account occurred".

FINDINGS AND CONCLUSIONS AS TO CHARGE SEVEN

1. The transcript of Respondent's testimony on May 20, 1982 at the offices of the Petitioner was received in evidence as Petitioner's Ex. 12.

2. I find the testimony given by Respondent as reflected in that transcript wholly insufficient to support the allegation of a failure to cooperate with the Petitioner, and accordingly find this Charge not to have been sustained.

CHARGES EIGHT AND NINE

These Charges are contained in a Supplemental Petition.

In Charge Eight it is alleged that Respondent "has been guilty of neglecting a legal matter entrusted to him and of failing to communicate with his client, one Peter Gruenberg."

In Charge Nine it is alleged that Respondent has failed to cooperate with Petitioner in that Respondent did not respond to two letters sent to him by Petitioner regarding the complaint of one Peter Gruenberg.

THE EVIDENCE

On Charge Eight, Peter Gruenberg testified that he retained Respondent in April, 1982 to represent him to obtain reinstatement to his job with the New York Telephone Company. Mr. Gruenberg testified that he paid a retainer fee of

$5,000 to Respondent. On his direct examination he testified that shortly after he retained Respondent, Respondent telephoned him from Albany to tell him that he had seen "a top man in the telephone company" regarding reinstatement of Mr. Gruenberg and that Respondent was continuing to work on the case. He testified that about a month later he received another telephone call from Respondent in Albany in which Respondent advised that there had been no progress made but that he was continuing to work on it. He testified that between the time Respondent was retained, in April, 1982 and through May, 1982 that Respondent had called him four times and that he has had no further communication from Respondent from sometime in May, 1982 until the date of the hearing herein on April 26, 1983. He had filed a complaint with the Grievance Committee against Respondent in

October 1982. He also testified that he telephoned Respondent at least a dozen times and left messages with his secretary to which he got no response, and that in December, 1982 (after he had filed a complaint in October 1982) he sent a registered letter to Respondent which was returned as unclaimed. (Tr. Pp. 65-70.)

On cross examination Mr. Gruenberg acknowledged that he did have personal meetings with Respondent in June and July, 1982. He further testified that when he retained Respondent that he was told by him that there were no assurances that attempts to get him reinstated with the telephone company would be successful. (Tr. Pp. 70-74.)

Respondent testified that when he was retained, Mr. Gruenberg told him that he had been discharged from the telephone company in February, 1982 on certain formal charges at which hearings he had been

represented by his union and that his case had been reviewed by management during which he was again represented by his union. Respondent testified that he contacted various people at the telephone company and he was informed that Respondent's employment had been terminated because this was the second incident involving possible misappropriation of telephone equipment. Respondent testified that at his second meeting with Mr. Gruenberg he informed him what he had learned from the telephone company personnel and told him that he was going to communicate with other telephone company people as to possible reinstatement. Respondent testified that he contacted representatives of the telephone company in New York City and in Albany and that they had indicated they might consider reinstatement, but in another jurisdiction outside of New York City. Respondent

testified that he met with Mr. Gruenberg in person at least six or seven times and that there were numerous telephone calls and that he had even given Mr. Gruenberg his home telephone number; that he informed Mr. Gruenberg what he had learned from his conferences with telephone company personnel; that Mr. Gruenberg had indicated his willingness to transfer to another jurisdiction but that he had not been able to accomplish this with the telephone company; that he told Mr. Gruenberg that he would continue with his efforts to get the telephone company to further review the matter. Respondent testified that he had spent at least 60 hours on this matter. Respondent testified that to his complete shock and surprise he received a letter from the Grievance Committee for the Ninth Judicial District enclosing a letter of complaint from Mr. Gruenberg dated

October 28, 1982. That letter is Pet. Ex. 17A. (Tr. Pp. 202-209.)

Mr. Gruenberg's letter of complaint to the Grievance Committee recites that during the past seven months Respondent had been in contact with him approximately five times and that Respondent had not responded to telephone messages for approximately one month. He also stated in his letter "I feel he has been overpaid for the improper representation I have received."

FINDINGS AS TO CHARGE EIGHT

1. Respondent was retained by Mr. Peter Gruenberg in April, 1982 to represent him to try to obtain reinstatement of his position with the New York Telephone Company. Respondent was paid a retainer fee of $5,000.

2. Respondent had several conferences with Mr. Gruenberg. Respondent had

several conferences with various representatives of the New York Telephone Company in an attempt to have the telephone company review its decision of termination of Mr. Gruenberg's employment.

3. Respondent was still attempting to obtain reinstatement for Mr. Gruenberg when Mr. Gruenberg filed a complaint with the Grievance Committee in October 1982.

CONCLUSIONS AS TO CHARGE EIGHT

Upon the evidence I find that the Charge that "Respondent failed to take any substantial or meaningful steps on behalf of his client, thereby neglecting the legal matter that was entrusted to him" not to have been sustained.

The evidence indicates that although Respondent may not have been pursuing this matter vigorously, that he had been performing work with respect to same and was still performing such work when

Mr. Gruenberg filed a complaint against him.

There is no evidence to support the Charge that Respondent neglected this matter.

I further conclude from the evidence that the Charge that Respondent "has failed to communicate with his client" not to have been sustained. The evidence indicates that there was substantial and continued communication between Respondent and the client up until the time the client filed his complaint against Respondent.

CHARGE NINE

In Charge Nine it is alleged that Petitioner sent a letter to Respondent dated October 28, 1982 requesting Respondent to submit an Answer to the complaint of Mr. Gruenberg in his letter dated October 22, 1982 and that Respon-

dent did not reply to the said letter from the Petitioner. It is also alleged that a second letter dated November 15, 1982 was sent to Respondent by certified mail again requesting an Answer to the Gruenberg complaint and that Respondent did not answer that letter.

In his testimony herein Respondent admitted to not having responded to either of the said letters sent by the Petitioner regarding the Gruenberg complaint. His explanation for not responding to the said letters is contained on pages 222-223 of the transcript, wherein he states "Basically, when I got the letter I was in shock, because I was working on the Gruenberg matter. I had had dialogues on it. I thought his complaint was just in reference to the fee". He also testified that he believed that the complaint had no merit.

FINDINGS AS TO CHARGE NINE

1. Petitioner sent a letter to Respondent dated October 28, 1982 regarding the complaint of Peter Gruenberg and requested a response from Respondent. Respondent did not reply to the said letter.

2. Petitioner sent a letter by certified mail to Respondent dated November 15, 1982 again requesting a response regarding the Gruenberg complaint. Respondent did not reply to that letter.

CONCLUSIONS AS TO CHARGE NINE

Respondent has admitted receiving the said two letters from Petitioner and not having replied to either of said letters. I conclude that the Charges contained in Charge Nine that Respondent has engaged in conduct prejudicial to the administration of justice by failing to cooperate with Petitioner and attempting

to forestall its legitimate investigation of a complaint, have been sustained.

Dated: White Plains, New York
September 2, 1983

Respectfully submitted,

/s/ Morton B. Silberman
MORTON B. SILBERMAN
Special Referee

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 4, 1982.

HON. MILTON MOLLEN, Presiding Justice,
HON. VINCENT D. DAMIANI,)
HON. VITO J. TITONE,) Associate
HON. LEON D. LAZER,) Justices
HON. GUY J. MANGANO.)

In the Matter of Fortune S. Macri, an attorney and counselor at law.	Order Authorizing Disciplinary Proceeding.

Based on the acts of professional misconduct set forth in the report of the Grievance Committee for the Ninth Judicial District attached to its petition, dated May 13, 1982 with respect to Fortune S. Macri, an attorney and counselor at law, who was admitted to practice by the Appellate Division of the Supreme Court, First Judicial Department on June 18,

1962;

And, upon the decision slip of the court herein, heretofore filed and made a part hereof; and pursuant to statute (Judiciary Law, § 90, subd 7), it is

ORDERED that the Grievance Committee for the Ninth Judicial District is hereby authorized to institute and prosecute a disciplinary proceeding in this court, as petitioner, against the said Fortune S. Macri based on the acts of professional misconduct set forth in the said committee's report and on any other charges of professional misconduct by the said attorney which may come to the said committee's attention, and it is further

ORDERED that Gary L. Casella, Esq., Chief Counsel to the Grievance Committee for the Ninth Judicial District, 200 Bloomingdale Road, White Plains, New York 10605, is hereby appointed as

attorney for the petitioner in such proceedings.

Enter: IRVING N. SELKIN

Clerk of the
Appellate Division

SUPREME COURT OF THE STATE
OF NEW YORK
APPELLATE DIVISION : SECOND
JUDICIAL DEPARTMENT

----------X

In the Matter of FORTUNE S. MACRI, an Attorney and Counsellor-at-Law:

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner,

-against-

FORTUNE S. MACRI,

Respondent

----------X

NOTICE OF PETITION

S I R S:

PLEASE TAKE NOTICE, that upon the annexed petition of Frank H. Connelly, Jr., Chairman of the Grievance Committee for the Ninth Judicial District, verified on the 15th day of July 1982, a motion will be made before this Court at the

courthouse, 45 Monroe Place, in the Borough of Brooklyn, County of Kings, City and State of New York, on the 13th day of August, 1982, at nine thirty o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order directing that the respondent, FORTUNE S. MACRI, as an attorney and counsellor-at-law, be disciplined upon the charges set forth in the annexed petition, and for such other or further action upon the charges embodied in the annexed petition, as justice may require, and for such other and further relief as may be just and proper. Respondent shall serve and file two copies of his answer with proof of service on or before the return date.

Dated: White Plains, New York
July 16, 1982

Yours, etc.

GARY L. CASELLA
Attorney for Petitioner

Office and P.O. Address
200 Bloomingdale Road
White Plains, New York 10605

TO: Fortune S. Macri, Esq.
199 Main Street
White Plains, NY 10601

SUPREME COURT OF THE STATE
OF NEW YORK
APPELLATE DIVISION : SECOND
JUDICIAL DEPARTMENT

----------X

In the Matter of FORTUNE S. :
MACRI, an Attorney and
Counsellor-at-Law: :

GRIEVANCE COMMITTEE :
FOR THE
NINTH JUDICIAL DISTRICT, :
PETITION

Petitioner :

-against- :

FORTUNE S. MACRI, :

Respondent. :

----------X

TO THE HONORABLE, THE PRESIDING
JUSTICE AND ASSOCIATE JUSTICES
OF THE APPELLATE DIVISION OF
THE SUPREME COURT OF THE STATE
OF NEW YORK, SECOND JUDICIAL
DEPARTMENT:

The petition of the Grievance Committee for the Ninth Judicial District respectfully alleges that:

FIRST: By order of this Court, dated and filed June 4, 1982, the Grievance Committee for the Ninth Judicial District was authorized to institute and prosecute a disciplinary proceeding in this Court against Fortune S. Macri based on the acts of professional misconduct as set forth in the confidential report of the Grievance Committee for the Ninth Judicial District filed with the Court and on any other charges of professional misconduct by said attorney which may come to said Committee's attention. Further, said order appointed Gary L. Casella as attorney for the petitioner in this proceeding.

SECOND: Said order of June 4, 1982 was duly made and filed by this Court pursuant to the authorization of §90 of the Judiciary Law and pursuant to §691.4 of the Rules Governing the Conduct of Attorneys of this Court.

THIRD: The respondent, FORTUNE S. MACRI, was admitted to practice as an attorney and counsellor-at-law in the courts of the State of New York by the Appellate division of the State Supreme Court, First Judicial Department, on June 18, 1962.

FOURTH: Upon information and belief at all times hereinafter mentioned, respondent engaged in the practice of law in the State of New York and maintained offices for said purpose in Westchester County.

FIFTH: Upon information and belief, respondent, FORTUNE S. MACRI, has been guilty of illegal, corrupt and unethical practices and of professional misconduct and conduct prejudicial to the administration of justice as an attorney and counsellor-at-law in that:

CHARGE ONE

A. Respondent, FORTUNE S. MACRI, has been guilty of conduct involving dishonesty, fraud, deceit and misrepresentation by converting funds which were entrusted to him, as follows:

1. In or about 1977, Lydia L. Naclerio, represented by counsel, brought on an action for divorce against her husband, Raymond Naclerio, who was represented by respondent.

2. On or about December 21, 1977, a stipulation was entered into pursuant to which, inter alia, $30,000 was to be held in escrow by respondent until he was furnished with a certified copy of a judgment of divorce. Said $30,000 (as well as an additional payment of $5,000

which was made to Mrs. Naclerio) was in satisfaction of her interest in the marital abode which had been owned as tenants by the entirety with Mr. Naclerio.

3. In or about January or February, 1978, respondent caused the $30,000 to be deposited into his account entitled "Fortune S. Macri, Counselor at Law, Escrow Account," No. 162 0-06632 with the Manufacturer's Hanover Trust Co., White Plains, New York branch.

4. Although he was without authority to withdraw the aforesaid funds from escrow, as early as April, 1978 respondent's account dropped below the $30,000 he was required to be

holding as a result of his conversion of the escrow funds entrusted to him.

5. Thereafter and until in or about April, 1981, respondent's aforesaid escrow account repeatedly reflected that there had been overdrafts as a result of his having converted funds which were entrusted to him to be held in escrow.

CHARGE TWO

B. Respondent, FORTUNE S. MACRI, has been guilty of conduct that adversely reflects on his fitness to practice law, by issuing a check against his attorney escrow account which was drawn on insufficient funds, as follows:

1. By check dated March 31, 1981 in the amount of $30,000 drawn against his aforesaid

at orney escrow account delivered to and made payable to Daniel K. Ettinger, as attorney for Mrs. Naclerio, respondent purported to make payment of the $30,000 which he was to have been holding in escrow. However, at the time and until approximately April 28, 1981, there was no more than $473.45 on deposit in said account.

2. By teller's check dated April 28, 1981 drawn on the Manufacturer's Hanover Trust Co., in the amount of $30,000, respondent caused payment to be effected to Mrs. Naclerio.

CHARGE THREE

C. Respondent has been guilty of conduct which is prejudicial to the administration of justice and which constitutes

fraud, deceit and misrepresentation upon a tribunal and upon an adversary attorney, among others, as follows:

1. On or about November 14, 1980, respondent appeared in the Supreme Court of the State of New York, Bronx County, before the Hon. Irwin M. Silbowitz, in the aforesaid Naclerio v. Naclerio action.

2. Also present were the plaintiff and defendant Raymond and Lydia Naclerio, and the wife's then attorney, Daniel K. Ettinger, Esq.

3. Respondent at that time read a stipulation into the record in which he falsely represented that the $30,000 was being held in escrow by him when, in reality, the balance in his

escrow account at the time was only $37.75.

CHARGE FOUR

D. Respondent, FORTUNE S. MACRI, has been guilty of conduct that adversely reflects on his fitness to practice law by failing to maintain a duly constituted escrow account and of commingling clients' funds, as follows:

1. In the period between 1976 to date, respondent maintained a bank account with Manufacturer's Hanover Trust Co., entitled "Fortune S. Macri, Counsellor at Law, Escrow Account," No. 162 0-06632, in which account respondent commingled clients' and personal funds and caused checks to be issued for both escrow and personal obligations.

CHARGE FIVE

E. Respondent, FORTUNE S. MACRI, has been guilty of failing to maintain for the period of 1977 to date, a ledger book or similar record for his attorney escrow account in violation of §691.12(b) of the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department. [22 NYCRR §691.12(b)]

CHARGE SIX

F. Respondent, FORTUNE S. MACRI, has been guilty of conduct which is prejudicial to the administration of justice, adversely reflects on his fitness to practice law and which violates §691.12(b)(d)(e) of the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department (22 NYCRR §691.12) by substantially failing to honor a subpoena duces tecum, so ordered by the Appellate

Division, Second Judicial Department, as follows:

1. Respondent was served with a subpoena duces tecum, so ordered by the Appellate Division, Second Judicial Department, and made returnable originally on April 5, 1982 but adjourned ultimately to May 20, 1982. He was to produce pursuant thereto:

(1) All cancelled checks, check stub books, deposit slips, and bank statements for your attorney escrow account for the period of January 1, 1977 to date;

(2) Your ledger book or similar record for your attorney escrow account for the period of

January 1, 1977 to date; and

(3) Your entire file in the action entitled Naclerio v. Naclerio.

2. However, of the items subpoenaed, respondent submitted only bank statements for his escrow account for the period of June, 1981 through March, 1982, when the account was inactive and his Naclerio file, claiming that in essence all his escrow records could not be located.

CHARGE SEVEN

G. Respondent, FORTUNE S. MACRI, has been guilty of conduct prejudicial to the administration of justice by failing to cooperate with petitioner and attempting to frustrate its legitimate investigation of alleged acts of professional mis-

conduct against him, as follows:

1. On May 20, 1982, respondent, with his counsel present, gave testimony under oath at the offices of petitioner, pursuant to a judicial subpoena.

2. In a clear effort to impede the investigation of petitioner, respondent repeatedly testified that he could not recollect, inter alia, why certain large withdrawals were made from his attorney escrow account or why continuous overdrafts in that account occurred.

SIXTH: Respondent, FORTUNE S. MACRI, knew or should have known in committing the aforesaid acts, that he was violating the applicable statutes of the State of New York; the Code of Professional Responsibility of the New York State Bar Association effective January 1, 1970,

as amended, including Disciplinary Rule 1-102(A)(4)(5)(6), Disciplinary Rule 9-102(A)(B), and §691.12(a)(b)(d)(3) of the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Judicial Department. [22 NYCRR §691.12]

SEVENTH: The source of petitioner's knowledge and the grounds for its belief are the facts in evidence as set forth in the report of the Grievance Committee for the Ninth Judicial District filed with the Appellate Division, Second Department.

WHEREFORE, petitioner prays that an order directing that respondent, FORTUNE S. MACRI, as an attorney and counsellor-at-law be disciplined upon the charges as set forth herein and for such other action as may be contemplated by §90 of the Judicial Law of the State of New York.

/s/
Frank H. Connelly, Jr.
Chairman

Dated: White Plains, New York
July 16, 1982

STATE OF NEW YORK)
ss.:
COUNTY OF WESTCHESTER)

FRANK H. CONNELLY, JR., affirms that the following statements are true under the penalties of perjury.

1. I am Chairman of the Grievance Committee for the Ninth Judicial District.

2. By order dated June 4, 1982, this Court authorized petitioner to institute and prosecute a disciplinary proceeding against FORTUNE S. MACRI, respondent herein.

3. I have read the foregoing petition and know the contents thereof. The same is true to my knowledge, except as to matters therein stated to be alleged upon information and belief, and as to this matters, I believe them to be true.

/s/ Frank H. Connelly, Jr.
Frank H. Connelly, Jr.

Dated: White Plains, New York
July 16, 1982

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on October 29, 1982.

(NOT TO BE PUBLISHED)

HON. MILTON MOLLEN, Presiding Justice,
HON. VINCENT D. DAMIANI,)
HON. VITO J. TITONE,) Associate
HON. LEON D. LAZER,) Justices
HON. LAWRENCE J. BRACKEN)

In the Matter of Fortune S. Macri, an attorney.	
Grievance Committee for the Ninth Judicial District,	Order of Reference.
Petitioner;	
Fortune S. Macri,	
Respondent.	

A disciplinary proceeding having been instituted in this court upon the petition of the Grievance Committee for the Ninth Judicial District in respect to the above named respondent, Fortune S.

Macri, an attorney and counselor at law, who was admitted to practice by the Appellate Division of the Supreme Court, First Judicial Department, on June 18, 1962; the petition praying that the respondent be disciplined for professional misconduct upon the charges therein set forth; the proceeding having come on before this court by a notice of petition, dated July 16, 1982; and the respondent having filed an answer to the petition.

Now, upon the said petition, verified July 15, 1982; the said answer, verified August 18, 1982; and upon all the papers filed herein; and the proceeding having been submitted by Gary L. Casella, Esq., of counsel for the petition and submitted by Fortune S. Macri, Esq., respondent pro se, due deliberation having been had thereon; and upon this court's decision slip

heretofore filed and made a part hereof, it is

ORDERED that the issues raised by Charges one, two, three, four, six, and seven and the answers thereto (Charge five having been deemed admitted) are hereby referred to Hon. MORTON B. SILBERMAN (a former Justice of the Supreme Court), c/o Clark, Gagliardi & Miller, Esq., 99 Court Street, White Plains, New York, 10601, as Special Referee, to hear and report, with his findings upon each of the issues.

Enter: IRVING N. SELKIN

Clerk of the
Appellate Division

SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPT.

I, IRVING N. SELKIN, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy

with the original filed in my office on October 29, 1982 and that this copy is a correct transcription of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on October 29, 1982.

/s/ Irving N. Selkin
Clerk

(NOT TO BE PUBLISHED)

No. 5867 In the Matter of Fortune S. Macri, an attorney.

The Grievance Committee for the Ninth Judicial District, Petitioner;

Fortune S. Macri, respondent.

In a proceeding to discipline respondent, an attorney and counselor at law, for professional misconduct, the issues raised by Charges one, two, three, four, six and seven and the answers thereto (Charge five having been deemed admitted) are referred to: Hon. Morton S. Silberman (a retired Justice of the Supreme Court), Clark, Gagliardi & Miller, Esqs., 99 Court Street, White Plains, N.Y. 10601, as Special Referee, to hear and to report, with his findings upon each of the issues.

MOLLEN, P.J., DAMIANI, TITONE, LAZER & BRACKEN, JJ., concur.

October 29, 1982	IN RE MACRI, FORTUNE S., AN ATTORNEY	No. 5867

(NOT TO BE PUBLISHED)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL
DEPARTMENT

----------X

In the Matter of FORTUNE S. :
MACRI, an Attorney and
Counselor-at-Law: :

GRIEVANCE COMMITTEE :
FOR THE
NINTH JUDICIAL DISTRICT, : NOTICE OF
SUPPLEMENTAL
Petitioner, : PETITION

-against- :

FORTUNE S. MACRI, :

Respondent. :

----------X

S I R S:

PLEASE TAKE NOTICE that upon the annexed Supplemental Petition of Frank H. Connelly, Jr., Chairman of the Grievance Committee for the Ninth Judicial District, verified on the 6th day of December, 1982, and the order of this Court authorizing the instant proceeding, dated and filed June 4, 1982, and the

Order of Reference of this Court, dated and filed October 29, 1982, appointing the Hon. Morton B. Silberman, Special Referee in this matter, a motion will be made before this Court at the courthouse, 45 Monroe Place, in the Borough of Brooklyn, County of Kings, City and State of New York, on the 24th day of December, 1982, at nine-thirty o'clock in the forenoon of that day or as soon thereafter as counsel be heard for an order:

(1) Allowing respondent ten days from service thereof, within which to answer the Supplemental Petition; and

(2) Referring any issues raised by the answer to the Supplemental Petition to the Hon. Morton B. Silberman, as Special Referee: and

(3) Directing that respondent, FORTUNE S. MACRI, as an attorney and counselor-at-law be disciplined upon the charges as set forth herein as well as

those previously set forth in the petition of the Grievance Committee for the Ninth Judicial District, dated July 16, 1982 and filed with this Court.

Dated: White Plains, New York
Dated: December 6, 1982.

Yours, etc.

GARY L. CASELLA
Attorney for Petitioner

Office and P.O. Address
200 Bloomingdale Road
White Plains, NY 10605
914-949-4540

TO: Fortune S. Macri, Esq.
199 Main Street
White Plains, NY 10601

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL
DEPARTMENT

----------X

In the Matter of FORTUNE S. MACRI, an Attorney and Counselor-at-Law:

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner,

-against-

FORTUNE S. MACRI,

Respondent.

SUPPLEMENTAL PETITION

----------X

TO THE HONORABLE, THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT:

The Supplemental Petition of the Grievance Committee for the Ninth Judicial District respectfully alleges that:

FIRST: The allegations contained

in paragraphs of the petition annexed hereto, designated "FIRST," "SECOND," "THIRD," AND "FOURTH" are repeated, reiterated, and realleged as if fully set forth herein.

SECOND: The allegations contained in paragraph "FIFTH," Charges One (A), Two (B), Three (C), Four (D), Five (E), Six (F), and Seven (G) are repeated and reiterated. In addition thereto, petition further alleges:

CHARGE EIGHT

H. Respondent, FORTUNE S. MACRI, has been guilty of neglecting a legal matter entrusted to him and of failing to communicate with his client, in that:

1. On or about April 12, 1982, Peter H. Gruenberg retained respondent to represent him in an application to be reinstated to a position with the New York

Telephone Company.

2. From April 12, 1982 to date, respondent has failed to take any substantial or meaningful steps on behalf of his client, thereby neglecting the legal matter that was entrusted to him.

3. Since in or about September, 1982 to date, respondent has failed to communicate with his client despite Gruenberg's having left numerous messages with the office and at the home of respondent.

CHARGE NINE

I. Respondent, FORTUNE S. MACRI, has been guilty of engaging in conduct prejudicial to the administration of justice by failing to cooperate with petitioner and attempting to frustrate

its legitimate investigation of a complaint as follows:

1. By letter dated October 22, 1982, Gruenberg filed a complaint against respondent, the allegations of which are set forth in CHARGE EIGHT, supra.

2. By letter dated October 29, 1982, properly addressed and placed in a depository of the U.S. Postal Service, petitioner requested respondent to submit an answer to the Gruenberg complaint within ten days. However, no response was supplied.

3. Petitioner then sent a second letter to respondent by certified mail, return receipt requested, dated November 15, 1982 properly addressed and

placed in a depository of the U.S. Postal Service, again requesting an answer to the Gruenberg complaint within three days. The receipt came back duly signed. Nevertheless, to date, an answer has not been submitted.

THIRD: The allegations contained in paragraphs "SIXTH" and "SEVENTH" of the petition are also repeated, reiterated and realleged as if fully set forth herein.

WHEREFORE, petitioner prays that an order directing that the respondent, FORTUNE S. MACRI, as an attorney and counselor-at-law be disciplined upon the charges as set forth herein, as well as those previously alleged in the petition of the Grievance Committee for the Ninth Judicial District, dated July 16, 1982 and filed with this Court, and for such

other action as may be contemplated by Section 90 of the Judiciary Law of the State of New York.

Dated: White Plains, New York
December 6, 1982.

/s/ Frank H. Connelly, Jr.
Frank H. Connelly, Jr.
Chairman

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

FRANK H. CONNELLY, JR., an attorney admitted to practice in the Courts of the State of New York, affirms that the following statements are true under the penalties of perjury:

That he is Chairman of the Grievance Committee for the Ninth Judicial District, the petitioner in the within proceeding.

That he has read the foregoing supplemental petition and knows the contents thereof, and that the same are true upon information and belief.

Dated: White Plains, New York
Dated: December 6, 1982.

/s/ Frank H. Connelly, Jr.
Frank H. Connelly, Jr.
Chairman

At a Term of the Appellate Division of the Supreme Court in the State of New York, Second Judicial Department, held in Kings County on February 10, 1983.

HON. MILTON MOLLEN, Presiding Justice,
HON. VINCENT D. DAMIANI,)
HON. VITO J. TITONE,) Associate
HON. LEON D. LAZER,) Justices
HON. LAWRENCE J. BRACKEN.)

(NOT TO BE PUBLISHED)

In the Matter of Fortune S. Macri, an attorney.	
Grievance Committee for the Ninth Judicial District, Petitioner;	Order
Fortune S. Macri, Respondent.	

In the above entitled disciplinary proceeding, this court, by an order, dated October 29, 1982, having referred the issues raised by Charges one, two, three, four, six and seven of the petition (Charge five having been deemed admitted)

and the answers thereto to Hon. MORTON B. SILBERMAN (a former Justice of the Supreme Court), as Special Referee, to hear and report, with his findings upon each of the issues; and the petition having moved, by a notice of motion dated December 6, 1982, (1) to allow the respondent ten days to answer the charges contained in the supplemental attached to the said notice of motion, (2) to refer any issues raised by the answer to the said supplemental petition to the said Special Referee, and (3) to discipline the respondent on said additional charges; and, on December 23, 1982, the respondent having filed an answer to the supplemental petition;

Now, upon the said notice of motion, the supplemental petition, verified December 6, 1982, the said answer, dated December 17, 1982; and upon all the papers filed herein; and the

motion having been submitted by Gary L. Casella, Esq., of counsel for the petition and submitted by Fortune S. Macri, Esq., the respondent pro se, due deliberation have been had there; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the said motion is hereby granted, and it is further

ORDERED that the issues raised by the supplemental petition and the answer thereto are hereby referred to the said Hon. MORTON B. SILBERMAN, as Special Referee, to hear and to report on the issues, together with his findings, to be combined with the charges which are already before the said Special Referee.

Enter: IRVING N. SELKIN

Clerk of the
Appellate Division.

SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPT.

I, IRVING N. SELKIN, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy with the original filed in my office on Feb 10 1983 and that this copy is a correct transcription of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on Feb 10, 1983.

/s/ Irving N. Selkin

Clerk

(Not to be published)

No. 9749 In the matter of Fortune S. Macri, an attorney and counselor at law. Grievance Committee for the Ninth Judicial District, petitioner v. Fortune S. Macri, respondent.

In a proceeding to discipline the respondent for professional misconduct, the petitioner moves to (1) allow the respondent ten days to answer the charges contained in the supplemental petition and (2) to refer any issues raised by the answer to said supplemental petition to the Special referee; and (3) discipline the respondent on said additional charges.

Motion granted.

The issues raised by the supplemental petition and the answer are referred to

Hon. Morton B. Silberman, as Special Referee to hear and to report on the issue, together with his findings, to be combined with the charges which are already before said Special Referee.

MOLLEN, P.J., DAMIANI, TITONE, LAZER & BRACKEN, JJ.

February 10, 1983 In the matter of Fortune S. Macri

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----------X

In the Matter of FORTUNE S. MACRI, an Attorney and Counselor-at-Law:

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner,

-against-

FORTUNE S. MACRI,

Respondent.

NOTICE OF SECOND SUPPLEMENTAL PETITION

----------X

S I R S:

PLEASE TAKE NOTICE that upon the annexed Second Supplemental Petition of Frank H. Connelly, Jr., Chairman of the Grievance Committee for the Ninth Judicial District, verified on the 25th day of April, 1983, and the order of this Court authorizing the instant proceeding, dated and filed June 4, 1982, the Order

of Reference of this Court, dated and filed October 29, 1982, appointing the Hon. Morton B. Silberman, Special Referee in this matter, and the order dated February 10, 1983 referring the issues raised by the Supplemental Petition and answer thereto to the Special Referee, a motion will be made before this Court at the Courthouse, 45 Monroe Place, in the Borough of Brooklyn, County of Kings, City and State of New York, on the 6th day of May, 1983, at nine-thirty o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order:

(1) Allowing respondent ten days from service thereof, within which to answer the Second Supplemental Petition; and

(2) Referring any issues raised by the answer to the Second Supplemental Petition to the Hon. Morton B. Silberman,

as Special Referee; and

(3) Directing that respondent, FORTUNE S. MACRI, as an attorney and counselor-at-law be disciplined upon the charges set forth herein as well as those previously set forth in the Petition dated July 16, 1982 and Supplemental Petition dated December 6, 1982 of the Grievance Committee for the Ninth Judicial District, filed with this Court.

Dated: White Plains, New York
April 25, 1983

Yours, etc.

GARY L. CASELLA
Attorney for Petitioner
Office and P.O. Address
200 Bloomingdale Road
White Plains, New York 10605
914-949-4540

TO: Fortune S. Macri, Esq.
Respondent
199 Main Street
White Plains, NY 10601

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----------X

In the Matter of FORTUNE S. MACRI, an Attorney and Counselor-at-Law:

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, Petitioner,

-against-

FORTUNE S. MACRI, Respondent.

SECOND SUPPLEMENTAL PETITION

----------X

TO THE HONORABLE, THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

The Second Supplemental Petition of the Grievance Committee for the Ninth Judicial District respectfully alleges that:

FIRST: The allegations contained in paragraphs of the Petition and Supple-

mental Petition annexed hereto, designated "FIRST," "SECOND," "THIRD," and "FOURTH" are repeated, reiterated, and realleged as if fully set forth herein.

SECOND: The allegations contained in paragraph "FIFTH," Charges One (A), Two (B), Three (C), Four (D), Five (E), Six (F), Seven (G), Eight (H), and Nine (I) are repeated and reiterated. In addition thereto, petitioner further alleges:

CHARGE TEN

J. Respondent, FORTUNE S. MACRI, has been guilty of engaging in conduct which is prejudicial to the administration of justice by failing to account for funds of an estate as follows:

1. In or about 1978, respondent was retained to settle the Estate of Frances Myrick.

2. The value of the gross estate

was in excess of $170,000.

3. Respondent has failed to fully account for estate funds.

CHARGE ELEVEN

K. Respondent, FORTUNE S. MACRI, has been guilty of conduct involving dishonesty, fraud, deceit, or misrepresentation by converting clients' funds as follows:

1. Charge Ten is repeated and reiterated with full force and effect as if more fully set forth herein.

2. Respondent has converted to his own use and for his own purpose, funds in excess of $28,000 belonging to the Estate of Frances Myrick.

CHARGE TWELVE

L. Respondent, FORTUNE S. MACRI, has been guilty of neglecting a legal

matter entrusted to him and of failing to communicate with a client as follows:

1. Charges Ten and Eleven are repeated and reiterated with full force and effect as if more fully set forth herein.

2. Although respondent was retained in or about 1978 to settle the Estate of Frances Myrick, he has failed to date to do so.

3. The repeated inquiries of his client, Lenora E. Wooster (the Executrix of the Estate of Frances Myrick), notwithstanding, respondent has failed to respond thereto.

CHARGE THIRTEEN

M. Respondent, FORTUNE S. MACRI, has been guilty of engaging in conduct which reflects adversely on his fitness to practice law, by failing to honor

subpoenas so ordered by this Court and by failing to cooperate with petitioner as follows:

1. Charges Ten, Eleven and Twelve are repeated and reiterated with full force and effect as if more fully set forth herein.

2. By letter dated February 18, 1983 sent by both ordinary mail and certified mail, return receipt requested, petitioner requested that respondent submit an answer to the complaint of Lenora E. Wooster within seven days of his receipt of said letter. The receipt came back executed on behalf of respondent by an individual in his office. However, an answer was not timely received.

3. On March 3, 1983, respondent was personally served with a

Judicial Subpoena and Subpoena Duces Tecum, both so ordered by the Appellate Division, Second Department and both made returnable at petitioner's office on March 14, 1983.

4. By letter dated March 4, 1983 and received in petitioner's office on March 14, 1983, respondent submitted a brief and incomplete response to the complaint of Lenora E. Wooster.

5. By letter dated March 14, 1983 petitioner confirmed to respondent that an adjournment of the return date of the subpoenas had been consented to so that respondent would have ample time to retain counsel. Respondent was advised that the revised return date of April 4, 1983 was final.

6. By letter dated April 1, 1983

and received by petitioner on that day, Donald E. Humphrey, Esq., advised inter alia, that he had just been retained by respondent, that he needed additional time to familiarize himself with the matter, this his client was out of New York State and would "be returning on or about Monday, April 18, 1983," and requested that the matter be "rescheduled for Thursday, April, 21, 1983 . . ."

7. By letter dated April 4, 1983, petitioner confirmed to Mr. Humphrey, with copy to respondent, that the adjournment which had been consented to April 21, 1983 as requested was final, and that under no circumstances would any further adjournments be permitted.

8. On April, 21, 1983, Mr. Humphrey appeared at the offices of

petition with a telegram from respondent merely advising that respondent was unable to be present with no further explanation.

9. Respondent has been guilty of flaunting the aforesaid subpoenas so ordered by this Court in utter disregard and disrespect for this Court's authority and failing to cooperate with petitioner and of attempting to frustrate the legitimate investigation of petitioner.

THIRD: The allegations contained in paragraphs "SIXTH" and "SEVENTH" of the petition are also repeated, reiterated and realleged as if fully set forth herein.

FOURTH: Respondent, FORTUNE S. MACRI, knew or should have known in committing the aforesaid acts, that he was violating the applicable statutes of the

State of New York; the Code of Professional Responsibility of the New York State Bar Association effective January 1, 1970, as amended, including DR 1-102(A)(4)(5)(6), DR 6-101(A)(3), and DR 9-102(A)(B).

WHEREFORE, petitioner prays that an order directing that the respondent, FORTUNE S. MACRI, as an attorney and counselor-at-law be disciplined upon the charges as set forth herein, as well as those previously alleged in the Petition and Supplemental Petition of the Grievance Committee for the Ninth Judicial District, filed with this Court, and for such other action as may be contemplated by Section 90 of the Judiciary Law of the State of New York.

Dated: White Plains, New York
April 25, 1983

/s/ Frank H. Connelly, Jr.
Frank H. Connelly, Jr.
Chairman

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

FRANK H. CONNELLY, JR., an attorney admitted to practice in the Courts of the State of New York, affirms that the following statements are true under the penalties of perjury:

That he is Chairman of the Grievance Committee for the Ninth Judicial District, the petitioner in the within proceeding.

That he has read the foregoing Second Supplemental Petition and knows the contents thereof, and that the same are true upon information and belief.

Dated: White Plains, New York
April 25, 1983

/s/ Frank H. Connelly, Jr.
Frank H. Connelly, Jr.
Chairman

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 1, 1983.

(NOT TO BE PUBLISHED)

HON. MILTON MOLLEN, Presiding Justice,
HON. VINCENT D. DAMIANI,)
HON. VITO J. TITONE,) Associate
HON. GUY J. MANGANO,) Justices
HON. LAWRENCE J. BRACKEN.)

In the Matter of Fortune S. Macri, an attorney and counselor at law.	)	ORDER ENTERED June 2, 1983
Grievance Committee for the Ninth Judicial District, Petitioner;	)	ORDER ON MOTIONS
Fortune S. Macri, Respondent.	)	

In the above entitled disciplinary proceeding, the above named Grievance Committee for the Ninth Judicial District, petitioner, having moved (1) by a notice of motion, dated April 25, 1983,

[a] to immediately suspend the respondent Fortune S. Macri from the practice of law, pending the determination of this proceeding, and [b] to punish the said respondent for contempt for his failure to comply with subpoenas, and (2) by a notice of second supplemental petition, dated April 25, 1983, to refer additional charges TEN through THIRTEEN to the Special Referee previously assigned herein;

Now, upon the said notice of motion to suspend and punish for contempt, the notice of second supplemental petition, the second supplemental petition and the affirmation of Gary L. Casella in support thereof; the affirmations of Nicholas C. Cooper and Fortune S. Macri in opposition to the motion to suspend and to punish for contempt; the affirmation of Donald E. Humphrey with reference thereto; the reply affirmation of Gary

L. Casella and the exhibits annexed thereto; and upon all the papers filed herein; and Gary L. Casella, Esq., having appeared of counsel for the petitioner and Nicholas C. Cooper, Esq., having appeared of counsel for the respondent, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that petitioner's motion to immediately suspend the respondent is hereby denied, and it is further

ORDERED that the petitioner's motion to punish the respondent for contempt for his failure to comply with subpoenas is hereby denied, with leave to renew if respondent failed to comply with the said subpoenas within ten days after the entry of this order, and it is further

ORDERED that the said charges contained in the second supplemental petition are hereby referred to the said Special Referee, Hon. MORTON B. SILBERMAN, to hear and to report, with his findings upon all of the issues in this disciplinary proceeding.

ENTER: IRVING N. SELKIN

SUPREME COURT, STATE OF NEW
APPELLATE DIVISION, SECOND. DEPT.

I, IRVING N. SELKIN, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy with the original filed in my office on June 2 1983 and that this copy is a correct transaction of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on Jun 2 1983.

/s/ Irving N. Selkin
Clerk

(NOT TO BE PUBLISHED)

No. 3444, 3445

In the Matter of Fortune S. Macri, an attorney and Counselor-at-Law.

Grievance Committee for the Ninth Judicial District, petitioner,
Fortune S. Macri, respondent.

Motion by petitioner to immediately suspend from the practice of law, pending determination of proceeding, denied.

Motion by petitioner to punish respondent for contempt for his failure to comply with subpoenas, denied with leave to renew if respondent fails to comply with said subpoenas within ten days after the entry of the order to made hereon.

Motion by petitioner to refer additional charges 10 through 13 to the Referee, granted.

Said charges are referred to Hon. Morton B. Silberman, as Special Referee, to hear and to report with his findings upon all of the issues in this disciplinary proceeding.

MOLLEN, P.J., DAMIANI, TITONE, MANGANO and BRACKEN, JJ., concur.

June 1, 1983 IN RE MACRI No's 3444/3445

(NOT TO BE PUBLISHED)

No. 84-1113

Office-Supreme Court, U.S.
FILED
JAN 7 1985
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1984

FORTUNE S. MACRI,

Petitioner,

vs.

GRIEVANCE COMMITTEE FOR
THE NINTH JUDICIAL DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Preliminary Statement 1

Statement of Jurisdiction 2

Statement of the Case 2

Argument:

I. Petitioner was accorded due process. 3

Conclusion 10

TABLE OF CITATIONS

Cases Cited:

Farago v. Burke, 262 N.Y. 229 (1933) 7

In re Ruffalo, 390 U.S. 544 (1968) 8

Matter of Macri, 63 N.Y. 2d 605 (1984) 1, 2

Matter of Macri, 102 A.D. 2d 53 (Second Dept. 1984)... 1

Shuman v. Conforti, 30 A.D. 2d 968 (Second Dept. 1968), aff'd, 26 N.Y. 2d 755 (1970) 7

Statutes Cited:

N.Y. Judiciary Law §90(4) 9

Contents

	Page
N.Y. Penal Law §155.35	9
28 U.S.C. §1257(3)	2
Rule Cited:	
22 N.Y.C.R.R. 691.4	3, 4, 5, 10

In The

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FORTUNE S. MACRI,

Petitioner,

vs.

GRIEVANCE COMMITTEE FOR
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On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

Respondent' s brief is submitted in opposition to the petition for a writ of certiorari, pursuant to the denial by order dated September 13, 1984 of the New York Court of Appeals to grant leave to appeal, *Matter of Macri*, 63 N.Y. 2d 605 (1984) from the order of the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York, which on June 4, 1984 disbarred petitioner. *Matter of Macri*, 102 A.D. 2d 53 (Second Dept. 1984).

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court, essentially under Title 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

In disbarring petitioner, Fortune S. Macri, after extensive hearings, pursuant to order dated June 4, 1984, the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York which had the benefit of the entire record to review fully, sustained the report of the Special Referee it had assigned to hear and report.

Petitioner was found guilty of six of the thirteen charges of professional misconduct that had been lodged against him, including conversion and failure to account for at least $54,000 of funds from the Estate of Frances Myrick, which petitioner had been handling (Charges Ten and Eleven), perpetrating a fraud upon a tribunal and upon an adversary attorney (Charge Three), commingling funds (Charge Four), failing to maintain a ledger book or similar record for his attorney escrow account (Charge Five), and of failing to cooperate with the respondent, Grievance Committee for the Ninth Judicial District of New York in its investigation (Charge Nine).

Petitioner's motion for leave to appeal to the New York Court of Appeals was thereafter denied. *Matter of Macri*, 63 N.Y. 2d 605 (1984).

ARGUMENT

I.

Petitioner was accorded due process.

The claim by petitioner that probable cause was lacking in the institution of the disciplinary proceeding against him, is frivolous indeed.

Section 691.4(a)(d)(f) of the New York Appellate Division, Second Department's Rules Governing the Conduct of Attorneys provides:

> §691. 4. Appointment of Grievance Committees; Commencement of Investigation of Attorney Misconduct: Complaints; Procedure
>
> (a) This court shall appoint three grievance committees for the Second Judicial Department. One of these grievance committees shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the second and eleventh judicial districts at the time of their admission to practice by the Appellate Division; another shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the ninth judicial district at the time of their admission to practice by the Appellate Division; and the third shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided

in the tenth judicial district at the time of their admission to practice by the Appellate Division. These committees shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom this Part applies pursuant to section 691.1 of this Part.

* * *

(d) Each grievance committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairman of the committee shall designate a member of the subcommittee to act as its chairman. Such subcommittees may hold hearings as hereinafter authorized.

(e) *Upon receipt or initiation of a specific complaint of professional misconduct, any such committee may, after preliminary investigation and upon a majority vote of the full committee:*

(1) dismiss the complaint and so advise the complainant and the attorney;

(2) conclude the matter by issuing a letter of caution to the attorney and by appropriately advising the complainant of such action;

(3) conclude the matter by privately admonishing the attorney, which admonition shall clearly indicate the improper conduct found and the disciplinary rule, canon or special rule which

has been violated, and by appropriately advising the complainant of such action;

(4) serve written charges upon the attorney and hold a hearing on the matter as set forth in subdivision (f) of this section;

(5) *forthwith recommend to this court the institution of a disciplinary proceeding where the public interest demands prompt action and where the available facts show probable cause for such action.*

(f) Except as otherwise provided in paragraph (5) of subdivision (e) of this section, if, after preliminary investigation, the committee shall deem a matter of sufficient importance, written charges predicated thereon, plainly stating the matter or matters charged, together with a notice of not less than 20 days, shall be served upon the person concerned, either personally, by certified mail, or in such other manner as the committee may direct. The person so served shall file a written answer at the time and place designated in the notice and the committee or a subcommittee shall proceed to hold a hearing of the case. The person concerned (hereinafter referred to as the respondent) may be represented and assisted by counsel. The committee or subcommittee shall decide all questions of evidence. Stenographic minutes of the hearing shall be kept.

(Emphasis supplied) (22 N.Y.C.R.R. 691.4).

In this matter, respondent conducted an extensive investigation, in which, *inter alia,* petitioner was questioned under

oath in the presence of his then counsel. Among other things, petitioner admitted during the course of his deposition, that he commingled funds. Based on a confidential report filed with the Appellate Division, Second Department, the disciplinary proceeding was authorized by order dated June 4, 1982. Petitioner cites the failure of the Appellate Division to sustain the conversion charge in the Naclerio matter (Charge One) as a basis for his vacuous claim that probable cause was not established to institute the disciplinary proceeding. What he fails to note, however, is that included in the original petition of charges filed against him, were charges which were sustained among others that he perpetrated a fraud upon a tribunal and an adversary attorney (Charge Three), commingled funds (Charge Four), and failed to maintain a ledger book or similar record for his attorney escrow account, as required by the Rules of the Appellate Division, Second Department (Charge Five).

These circumstances were all before the respondent, Grievance Committee for the Ninth Judicial District at the time of its filing of the aforesaid confidential report with the Appellate Division, Second Department, thereby fully satisfying the requirements for dispensing with an investigatory hearing before respondent since probable cause clearly existed for such action. In view of the egregious misconduct, prompt action was required.

Further, the alleged Naclerio conversion (Charge One) in the initial petition brought against petitioner was based on facts and case law which decidedly justified the charge.

During the course of petitioner's representation of Mr. Naclerio, a stipulation was entered into between Mr. and Mrs. Naclerio dated December 21, 1977. The terms of the stipulation, required petitioner to hold $30,000 in his escrow account pending the entry of a judgment of divorce and receipt of a certified copy of said judgment ending the marriage. The sum of $30,000 was

deposited into petitioner's escrow account at the Manufacturers Hanover Trust Company on February 28, 1978.

Petitioner had no authority at any time from Mrs. Naclerio to withdraw the aforementioned escrow funds, but as early as April 1978 his escrow account dropped below the $30,000 he was required to be holding as a result of the alleged conversion of the funds entrusted to him. Thereafter and until April 1981, when Mrs. Naclerio was paid the money owed her, petitioner's escrow account repeatedly reflected that there had been overdrafts as a result of his conversion of said funds. Petitioner sought to excuse his behavior by claiming that his client, Raymond Naclerio, gave permission for him to withdraw the money after Mrs. Naclerio allegedly breached the December 21, 1977 stipulation.

In addition to the applicable provisions of the Lawyer's Code of Professional Responsibility, respondent relied upon the cases cited *infra*, among others in concluding that petitioner had converted the $30,000 Naclerio fund. Accordingly, the charges were brought which included the alleged fraud upon a tribunal (Charge Three), commingling of funds allegation (Charge Four) and failure to maintain a ledger book or similar record (Charge Five) all of which, as set forth above, were sustained by the Special Referee and ultimately the Appellate Division.

In *Shuman v. Conforti*, 30 A.D. 2d 968 (Second Dept. 1968), *aff'd.*, 26 N.Y. 2d 755 (1970), the Appellate Division, Second Department stated that a premature disbursement of the escrow fund is incompatible with an escrow agent's ". . . obligation as an impartial trustee of the escrow fund." Also, in *Farago v. Burke*, 262 N.Y. 229 (1933), the Court of Appeals of the State of New York held that a duty is imposed on the depository of escrow as a trustee for both parties, ". . . not to deliver the escrow to anyone except upon strict compliance with the conditions imposed. . . ."

A court order authorizing the release of the $30,000 was never issued. Also, on or about November 14, 1980, petitioner appeared in the Supreme Court of the State of New York, Bronx County, before the Hon. Irwin M. Silbowitz in the *Naclerio v. Naclerio* action. In attendance were the plaintiff and defendant, Lydia and Raymond Naclerio, and the wife's then attorney, Daniel K. Ettinger, Esq. At that time, petitioner read a stipulation into the record in which he falsely represented that the $30,000 was being held in escrow by him when, in fact, the balance in his escrow account at the time was only $37.75.

Charge Three of the petition which alleged that petitioner had been guilty of conduct which is prejudicial to the administration of justice and which constitutes fraud, deceit and misrepresentation upon a tribunal and upon an adversary attorney was, as set forth above, thereafter sustained by the Special Referee and confirmed by the Appellate Division, Second Judicial Department.

It can certainly be speculated that as to the alleged Naclerio conversion that the Appellate Division, Second Department would have disaffirmed the findings of the Special Referee and sustained the conversion charge, but for the fact that the seriousness of this matter was diminished in light of the charges sustained concerning the conversion of at least $54,000 of funds from the Myrick estate which virtually required petitioner's ultimate disbarment.

An attorney who is the subject of a disciplinary proceeding which could potentially lead to his disbarment is entitled to procedural due process, including fair notice of the charge. *In re Ruffalo,* 390 U.S. 544 (1968).

In the case at bar, petitioner does not dispute that he was given notice of all the charges. Nor does he take issue with the

fact that he had a full and fair hearing before the Special Referee, including nine days of evidentiary hearings between December 1982 and July 28, 1983. In fact, he does not once dispute that the charges sustained were established by the evidence.

During the course of the hearings, petitioner repeatedly advised that he would repay the Myrick estate. Further, a representation was even made approximately at the time of the conclusion of the hearings in July 1983, that petitioner's counsel was holding about $20,000 in escrow deposited there by petitioner towards repayment of the Myrick estate.

However, to date petitioner has repaid not one penny of the funds converted from the Myrick estate, which the Special Referee found as described above was at least $54,000. In fact there was evidence during the hearing that petitioner may have converted as much as $88,000 from the Myrick estate.

As a result of petitioner's conversion and embezzlement, the New York Clients' Security Fund had no alternative but to make its maximum award of $25,000 to the Myrick estate.

Tragically, however, the estate has not nearly been made whole and has little hope of recovering the excess funds stolen by petitioner.

It is a matter of public record that as a result of this theft, petitioner currently is under indictment in Westchester County in the State of New York for Grand Larceny in the Second Degree, a Class D Felony under N.Y. Penal Law §155.35. The conviction of such felony under N.Y. Judiciary Law §90(4) would result in automatic disbarment for an attorney.

Indeed, petitioner who does not even take issue with the charges of gross professional misconduct sustained by the

Appellate Division, and his ilk are the very reason attorney grievance committees have become so essential.

Finally, petitioner's claim that virtually no hearings are held by respondent under Rule 691.4 (22 N.Y.C.R.R. 691.4) is absolutely false. In fact, hearings are held in all appropriate cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GARY L. CASELLA
Attorney for Respondent